17

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1123

J. WESLEY GLASGOW, APPELLANT,

vs.

WILLIAM H. MOYER, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED MAY 2 [illegible], 1912.

(23199)

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1 In United States District Court for Northern District of Georgia.

In re J. WESLEY GLASGOW, Petitioner.

The clerk will please incorporate the following papers in the record on appeal.

1. Petition, and order to file in forma pauperis.
Exhibits.
Waiver of Rule, Nisi and appearance.
Stipulation of Counsel.
Judgment.
Opinion of Court.
Order for appeal and order thereon.

JNO. C. FAY,
Attorney for Petitioner.

Service of Copy admitted this 6th day of April, A. D. 1912.
F. C. TATE,
Attorney for Respondent.

Filed in Clerk's Office April 6, 1912.
O. C. FULLER, *Clerk.*

2 In United States District Court for Northern District of Georgia.

In re J. WESLEY GLASGOW.

Petition for leave to apply for Writ Habeas Corpus in Forma Pauperis.

J. WESLEY GLASGOW, being duly sworn, says that he is now confined unlawfully in the United States Penitentiary in Atlanta, and that he is without means to pay the necessary expenses for procuring a writ of habeas corpus to enable the cause of his detention to be inquired into, that all his property personal was seized by the United States upon his arrest and has not been restored to him.

Wherefore, he prays the Court to permit him to apply for a Writ in Forma Propriis, as by law provided.

J. WESLEY GLASGOW.

Subscribed and sworn to before me this 21st day of March, 1912.
[SEAL] FRANK ROGERS,
Notary Public,
Fulton Co., Georgia.

Filed in open Court March 22, 1912.
O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy Clerk.*

Order.

March 22, 1912. Let the petition be filed in forma pauperis.
WM. T. NEWMAN,
United States Judge.

3 *Petition for Writ of Habeas Corpus.*

In United States District Court for Northern District of Georgia.

In re J. WESLEY GLASGOW.

Petition for Writ of Habeas Corpus.

To the Honorable W. T. Newman, Judge of the United States District Court for the Northern District of Georgia.

The petition of J. Wesley Glasgow of Evanston, Illinois, now incarcerated in the United States Penitentiary at Atlanta, Georgia, within the jurisdiction of this Honorable Court and unlawfully deprived of his liberty by one Wm. H. Moyer, warden of said Penitentiary, respectfully represents:

That on or about the 21st day of July, A. D. 1911, while he was temporarily in the city of Wilmington in the District of Delaware, he was unlawfully arrested by one Hugh H. McBride, a policeman of the said city, charged with peddling books without a license, and was discharged from said arrest, because the act charged was not forbidden by law, that he was immediately rearrested charged with offering to sell an obscene book and was taken before the Municipal Court and there at first convicted and sentenced to pay a fine of five dollars, and immediately in a few moments thereafter the judgment was remitted, as more fully appears by references to a certified copy of said proceedings filed herewith, marked Exhibit A and prayed to be read as part hereof.

That immediately he was rearrested upon the oath of John J. Purcell, a policeman of the city of Wilmington, charging him with having deposited an obscene book in the United States Mails, a copy of the warrant being hereto attached marked Exhibit B, and taken before Wm. G. Mahaffy, a United States Commissioner in and for the District of Delaware, who committed him on the 25th day of July, 1911 to the
4 custody of one L. Crawford, warden of the Newcastle County, Delaware, Workhouse, to await the action of the Grand Jury in default of $2500 bail, a copy of said proceeding being hereto attached marked Exhibit C, prayed to be read and considered as part hereof.

That on the 21st day of July, 1911, by order and direction of John P. Nields, United States Attorney for the District of Delaware, his rooms in the "Preston," where he was residing, were visited by a policeman and United States Marshal, and without any warrant or other lawful process, every vestige of his personal property, including his books, papers, wearing apparel, laundry, toilet articles were seized and taken possession of and carried off and deposited within the United States Court House, situate upon a United States reservation in the State of Delaware—and your petitioner's trunk which was in the custody of the United States Express Company was likewise seized by the United States Attorney and your petitioner deprived of every vestige of his property except the clothes on his back, and immediately on his arrival at the workhouse, July 25, 1911, before conviction or even indictment, he was stripped of the clothes on his back and was dressed in prison garb, and harsh prison rules enforced against him, to wit, viz: His letters to counsel were suppressed.

He was deprived of receiving or reading the newspapers, of, receiving food or clothing, all his letters sent or received were opened and read by the warden, Crawford, a most brutal man. He was fed on unwholesome prison fare, frequently uncooked and mouse eaten. All of which will more fully appear by reference to the annexed affidavits of A. P. Stevenson and John C. Fay, the printed regulations in force marked respectively Exhibits D, E, F, and G, copy of current newspapers, describing the lashings given prisoners by said Crawford, prayed to be read and
5 considered as part of this petition.

That he was confined in this prison, under these rules awaiting the action of the Grand Jury from the 25th of July to the 16th of October, 1911, when a Grand Jury summoned from jurors selected by Wm. G. Mahaffy as jury commissioner, the identical person who as United States Commissioner had committed him, returned an indictment into the United States District Court, charging him with depositing an obscene book in the United States mail, which was delivered to the same, identical Wm. G. Mahaffy, who in a third capacity as clerk of the United States District Court filed the same, all of which will more fully appear by reference to a certified copy of said indictment filed herewith, marked Exhibit H, and prayed to be read and considered as part hereof, and he was the next day without knowing the contents of the indictment or having seen a copy taken and arraigned, before E. G. Bradford, in his prison clothes.

Your petitioner further shows that notwithstanding said indictment charged no offense against the laws of the United States, and the same was couched in such vague and uncertain language that it did not apprise him of the offense, both of which defects he brought to the attention of the Honorable Edward G. Bradford, Judge of said Court, by pleas to his jurisdiction, demurrer, motion to quash, all of which pleas, demurrers and motion were by him overruled and your petitioner was placed upon trial before a jury chosen from jurymen selected by said Wm. G. Mahaffy, although the array was challenged for said cause and the number of peremptory challenges prescribed by law were not allowed him, he was forced to trial notwithstanding papers material to his defence were in the possession of and withheld by the United States Attorney with the knowledge and acquiescence of the Presiding Judge,
6 that said Judge refused to permit a dedimus potestatum to issue to take the testimony of non-resident witnesses residing more than 100 miles from the city of Wilmington, and refused to allow witnesses residing within 100 miles to be summoned, and under instructions of the Court, said jury was constrained to return a verdict of guilty, all of which more fully appears by reference to the affidavit of John C. Fay, Chas. C. Miller, Minutes of Court and Docket Entries filed herewith, marked Exhibit I, prayed to be read and considered as part hereof.

That after verdict your petitioner filed motion in arrest of judgment and for a new trial, which motions on the 2d day of January, 1912, were pending in said Court, and hearing thereon had been fixed by said Edward G. Bradford to be heard on Saturday, January 6, 1912, before himself, all of which will more fully appear by reference to a certified copy of the docket entries and minutes of said Court filed herewith marked Exhibit K, and prayed to be read and considered as part hereof, and to copies of said motions filed therewith.

That the said Edward G. Bradford having exhibited during said trial a deep seated prejudice against your petitioner and a violent partiality in favor of John P. Nields in his rulings, your petitioner in good faith and as by law he was entitled to do, on the 2d day of January, 1912, filed in said Court and delivered the same to the said Wm. G. Mahaffy, clerk of said Court in his office; and upon said Mahaffy's demand paid to him his lawful fees for filing the same, an affidavit charging said Edward G. Bradford with prejudice, an application to have the same certified to the senior Circuit Justice then present in the Circuit which was Honorable George Gray, Judge of the United States Circuit Court of Appeals for the 3d Circuit, together with the required certificate of counsel, as required by law, all of which will more fully appear by reference to a
7 carbon copy of the same and the affidavits of John C. Fay attached hereto, marked Exhibit L and prayed to be read as part hereof.

And your petitioner says, that upon the filing of the same, by the operation of the Act of March 3, 1911, which went into operation January 1, 1912, the said Edward G. Bradford became and was disqualified to further proceed in said cause, and any further action by him taken or attempted to be taken was without jurisdiction, coram non judice, unlawful and absolutely null and void.

But, notwithstanding, the said Bradford did unlawfully and in violation of the commands of the statute on the 6th day of January, 1912, did bring your petitioner before him and then and there direct and forbid the clerk of the Court to enter of record the said affidavit, application or certificate of counsel and did forbid the clerk to certify the same to the senior Circuit Judge of the 3d Circuit, and did then and there, against the protest of your petitioner's counsel, proceed to overrule the said motions for new trial and in arrest of judgment and against the protest of your petitioner, proceeded to pronounce a judgment against petitioner, sentencing him to confinement in the Penitentiary at Atlanta, Georgia, for a term of fifteen months from the 6th day of January, 1912, and to pay a fine of $500 as fully appears by reference to certified copy of minutes filed herewith, marked Exhibit M.

That immediately said Bradford placed your petitioner in the custody of Ralph I. Flynn, the United States Marshal, and he together with the assistance of one Mitchell, a deputy United States Marshal, by force imprisoned him in the United States Marshal's office from about 1 P.M., of January 6, 1912, and without permitting him to return to the workhouse to get his personal property there; at midnight of said day spirited him away by a circuitous route to Atlanta, taking passage by train to Cape Charles City, Virginia, and by boat to Norfolk, Virginia, where
8 he was imprisoned all of the next day, Sunday, and from thence without supplying him with food, and manicled, nor permitting to purchase it himself, arriving at Atlanta on the evening of January 8, 1912, and delivered him under said unlawful order of said Bradford to the custody of W. H. Moyer, and where he now is and has ever since been confined. Copy of Commitment being herewith attached marked Exhibit N, prayed to be considered as part hereof.

Your petitioner further shows that by the unlawful action of said Edward G. Bradford your petitioner not only is now unlawfully imprisoned, but by his refusal to certify said application, affidavit and certificate of counsel to the senior Judge of the Circuit Court of Appeals,

there is now no Judge of the United States District Court of Delaware, and no one there authorized to pass upon his motions in arrest of judgment or motion for a new trial, or competent to sit and certify to the exceptions reserved by him to the many errors committed by said Judge Bradford during his trial, or to permit him to have the same reviewed and set aside by any appellate tribunal.

Wherefore, your petitioner prays to grant to him a writ of habeas corpus directed to the said Wm. H. Moyer commanding him to produce the body of your petitioner before you on some short day certain to be named in the writ, to the end that your petitioner may be discharged from said unjust and unlawful imprisonment, and that he be forthwith restored to his liberty—or show cause to the contrary.

And your petitioner will ever pray.

J. WESLEY GLASGOW.

Northern District of Georgia,
Fulton County.

Sworn and subscribed before me this 21st day of March.

[SEAL] FRANK ROGERS,
Notary Public.

Filed in Clerk's Office 22d day of March, A. D. 1912.
O. C. FULLER, *Clerk.*
By J. D. STEWARD, *Deputy Clerk.*

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EXHIBIT A.

Municipal Court No. 28, July Term, A. D. 1911.

The Mayor and Council of Wilmington
vs.
J. Wesley Glascoe.

Complaint and Oath of William Hall charging J. Wesley Glascoe with offering for sale obscene book, containing lewd and obscene words. In the City of Wilmington, New Castle County, State of Delaware on the 20th day of July, A. D. 1911. Contrary to an Ordinance of the said City.

No warrant issued. July 20, A. D. 1911 John C. Purcell and Hugh McBride City Constables make return Cepi Corpus.

Information Filed Friday July 21, A. D. 1911.

July 21, A. D. 1911 9 A.M. The defendant arraigned and plead not Guilty and now, to wit; this 21st day of July A. D. 1911 the defendant being present after hearing all the evidence for the Mayor and Council of Wilmington and the defendant the Hon. Harry P. Joslyn, Deputy City Judge of the Municipal Court adjudged the defendant Guilty and sentence to pay a fine of five dollars and costs of prosecution and in default of payment to be committed to the said The Board of Trustees of the New Castle County Workhouse for 30 days at labor at some suitable employment, eight hours each secular day, unless physically disabled, the said commitment commencing on the 21 day of July A D 1911 and ending on the 9 day of September 1911 and he was committed to the custody of the High Constable until the sentence be carried out.

[SEAL] LEWIS LASSE, *Clerk of the Municipal Court.*

This is to certify that the above is a full and true copy of all the docket entries of the Municipal Court for the City of Wilmington in the case of The Mayor and Council of Wilmington vs. J. Wesley Glascoe.

LEWIS LASSE,
Clerk of the Municipal Court.

Costs. Costs below 1.25, Filing Information .25, Arraigning defendant .25, Solicitor's fee 2.00, Entering Judgment .50, Commitment .10, Witness Fees 1.00, Fine 5.00, Total 10.35.

Witnesses; William Hall. John Toner. John C. Purcell. Hugh McBride. Committed July 21, 11. Fine & Costs Remitted by order of Harry P. Joslyn, Deputy City Judge July 21, 11.

10 EXHIBIT B.

UNITED STATES OF AMERICA }
DISTRICT OF DELAWARE } *ss.*

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
To the United States Marshal for said district,

GREETING:

WHEREAS, complaint on oath hath been made to me charging that John Wesley Glasgow alias J. Wesley Glasgow late of the City of Wilmington, in the district of Delaware, at the district of Delaware aforesaid, on or about the twentieth day of July, A. D. 1911, did then and there knowingly and feloniously deposit and cause to be deposited in the Post Office of the said United States, at the said City of Wilmington, in the said district of Delaware, for mailing and delivery by the Post Office establishment of the said United States, a certain obscene, lewd, lascivious and filthy book, pamphlet, writing, print and publication of an indecent character, bearing on the outside cover thereof the words "Sexual Science," and containing one hundred and fourteen printed pages, of too great length and of too indecent character to be here set forth in full, and which said obscene, lewd, lascivious and filthy book, pamphlet, writing, print and publication of an indecent character was then and there enclosed in a paper wrapper bearing the address "Mr. Frank Wolf, 1215 Court Street, Scranton, Pa. Printed Matter," in violation of section 211 of the Act of Congress approved March 4th, 1909, and contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the said United States.

11 NOW, THEREFORE, you are hereby commanded to apprehend the said John Wesley Glasgow alias J. Wesley Glasgow, and bring his body before me forthwith to answer said complaint and to be dealt with according to law for said offense.

WITNESS my hand and seal this twenty first day of July, A. D. 1911.

(Sgd.) BARNET GLUCKMAN, J. P. [SEAL]

12 UNITED STATES OF AMERICA }
DISTRICT OF DELAWARE } *ss.*

On this 21st day of July, A. D. nineteen hundred and eleven, personally came the undersigned Justice of the Peace of the State of

Delaware in and for New Castle County John C. Purcell, who being by me duly sworn according to law deposes and says, that one JOHN WESLEY GLASGOW alias J. WESLEY GLASGOW, late of the City of Wilmington, in the district of Delaware, at the district of Delaware aforesaid on or about the twentieth day of July, A. D. 1911, did then and there knowingly and feloniously deposit and cause to be deposited in the Post Office of the said United States at the said City of Wilmington, in the said district of Delaware, for mailing and delivery by the Post Office establishment of the said United States, a certain obscene, lewd, lascivious and filthy book, pamphlet, writing, print and publication of an indecent character, bearing on the outside cover thereof the words "Sexual Science" and containing one hundred and fourteen printed pages, of too great length and of too indecent character to be here set forth in full, and which said obscene, lewd, lascivious and filthy book, pamphlet, writing, print and publication of an indecent character was then and there enclosed in a paper wrapper bearing the address "Mr. Frank Wolf, 1215 Court Street, Scranton, Pa. Printed Matter," in violation of section 211 of the Act of Congress approved March 4, 1909, and contrary to the form of the act of Congress in such case made and provided and against the peace and
13 dignity of the said United States.

(Sgd.) JOHN C. PURCELL.

Subscribed and sworn to before me this twenty first day of July, A. D. 1911.

(Sgd.) BARNET GLUCKMAN, J. P. [SEAL]

A true copy.
Attest:
(Sgd.) BARNET GLUCKMAN, J. P.

A true copy.
Attest:
WM. G. MAHAFFY,
United States Commissioner, [SEAL]
District of Delaware.

DISTRICT OF DELAWARE, *ss.*

Received this warrant on the twenty first day of July, 1911 at Wilmington, in said district and executed the same by arresting the within named defendant John Wesley Glasgow alias J. Wesley Glasgow, at Wilmington on the twenty first day of July, 1911 and have his body now in Court, as within I am commanded.

So answers,

(Sgd.) RALPH I. FLINN,
U. S. Marshal.

14 EXHIBIT C.

UNITED STATES OF AMERICA }
DISTRICT OF DELAWARE } *ss.*

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the United States Marshal for said district, and the Board of Trustees and Warden of the New Castle County Workhouse, New Castle County, Delaware, GREETING:

WHEREAS, after an examination in due form and agreeably to the usual mode of process against offenders in the State of Delaware, before me, William G. Mahaffy, United States Commissioner for the district of Delaware, there appears probable cause to believe that John Wesley Glasgow, alias J. Wesley Glasgow, late of the City of Wilmington, in the District of Delaware, at the district of Delaware aforesaid, on or about the twentieth day of July, A. D. 1911, did then and there knowingly and feloniously deposit and cause to be deposited in the Post Office of the said United States at the said City of Wilmington, in the said district of Delaware, for mailing and delivery by the Post Office establishment of the said United States, a certain obscene, lewd, lascivious and filthy book, pamphlet, writing, print and publication of an indecent character, bearing on the outside cover thereof the words "Sexual Science" and containing one hundred and fourteen printed pages, of too great length and of too indecent character to be here set forth in full, and which said obscene, lewd, lascivious and filthy book, pamphlet, writing, print and publication of an indecent character was then and there enclosed in a paper wrapper bearing the address "Mr. Frank Wolf, 1215 Court Street, Scranton, Pa. Printed Matter," in violation of section 211 of the Act of Congress approved March 4, 1909, and contrary to the form of the
15 act of Congress in such case made and provided and against the peace and dignity of the said United States.

AND WHEREAS, I have, agreeably to law, ordered the said John Wesley Glasgow, alias J. Wesley Glasgow, to enter into a recognizance, with sufficient surety, in the sum of two thousand five hundred dollars, for his appearance for trial for the said offense against the United States at the next District Court of the United States for the district of Delaware, to be held on the twelfth day of September, A. D. 1911, at Wilmington, in said district, as by law has cognizance of the said offense, or in default thereof to be committed to the New Castle County Workhouse, New Castle County, Delaware;

AND WHEREAS, the said John Wesley Glasgow, alias J. Wesley Glasgow has not offered such recognizance;

NOW, THEREFORE, you, the said Marshal, are hereby commanded that you convey the said John Wesley Glasgow, alias J. Wesley Glasgow to the said Workhouse, and you, the said Board of Trustees and Warden of the said Workhouse, are hereby commanded that you receive the said John Wesley Glasgow, alias J. Wesley Glasgow, and him there safely keep until he be discharged therefrom by due course of law.

WITNESS my hand and seal at Wilmington, in said district this twenty fifth day of July, A. D. 1911.

(Sgd.) WM. G. MAHAFFY,
United States Commissioner,
District of Delaware.

A true copy.

Attest:
WM. G. MAHAFFY,
United States Commissioner,
[OFFICIAL SEAL] District of Delaware.

DISTRICT OF DELAWARE, *ss.*

Received this Commitment, with the within named prisoner on the twenty fifth day of July, 1911 and on the same day I committed the said

prisoner to the custody of the Keeper named in said Commitment, with whom I left at the same time a certified copy of this Commitment.

(Sgd.) RALPH I. FLINN,
U. S. Marshal.

16 EXHIBIT D.

STATE OF DELAWARE)
NEW CASTLE COUNTY) *ss.*

Personally appeared before me, the subscriber, a Notary Public for the county and state aforesaid, Alfred P. Stevenson, personally known to be to me to be such, and who being by me first duly qualified according to law, solemnly and sincerely affirmed as follows: That he is a resident of the City of Wilmington, State of Delaware, and the proprietor of the Preston House in said city, located at 914 King Street; that in the month of June, 1911, J. Wesley Glasgow occupied rooms in affiant's house, and had there a number of books, clothing and other personal effects. That on or about the twentieth day of June, 1911, a policeman of the City of Wilmington together with a United States Marshall, came to affiant's house, entered the apartment occupied by said Glasgow, in his absence, and seized and took therefrom every article of personal property, including clothes, toilet articles, papers, laundry and everything whatsoever belonging to said Glasgow. That said officers did not exhibit or show any warrant or other authority of law for making said search and seizure. That the property of said Glasgow was taken to the United States Court House and there retained by the United States Marshall or the United States Postal Inspector.

ALFRED P. STEVENSON.

Affirmed and subscribed to before me, this fifteenth day of March, A. D., 1912.

GEORGE W. DORSEY, JR.,
Notary Public.

17 EXHIBIT E.

In United States District Court for the Northern District of Georgia.

In re
J. WESLEY GLASGOW.

JOHN C. FAY, being duly sworn, says that he prepared and has read the foregoing petition subscribed by J. Wesley Glasgow. That he acted as counsel for him at his recent trial; that on the day of the arraignment of the said Glasgow he called the attention of the court to the fact that his property had been unlawfully seized and that he had been stripped of his clothes and clothed in prison garb, and he was then in the presence of the court arrayed in the prison clothes and the attention of the court was especially directed to it, but the Court refused to allow affidavits showing improper treatment of prisoner to be filed and he continued to be brought into the presence of the court day after day dressed in the same way, and the court refused to interfere, alleging

that he had no authority; but that the matter was under the jurisdiction of the Attorney General and that the institution in which the defendant was confined was a State institution. That he offered to hear argument on the question whether he had the authority to interfere, but he declined to ameliorate his condition in any way, that the minutes of the court, as recorded to that are untrue, and in order to correct said minutes deponent demanded of the Deputy Clerk his stenographic notes of the exact occurrence, offering to pay him his lawful fees for a copy, but the clerk subsequently refused to permit him, said deputy, to furnish a copy which would disclose the falsity of the minutes, as recorded, as more fully appears by the annexed letter, and the said Bradford, upon
18 application to him refused to direct the clerk to furnish said stenographic notes or to direct him to amend his minutes to conform to the truth as shown by reference to the certified copy of the docket entries.

That deponent made further effort to obtain possession of the papers seized by the District Attorney and the District Attorney promised in open court to surrender them, and subsequently withheld the ones of value for the defense, and subsequently during the trial deponent made further efforts to open court to compel the District Attorney to surrender said papers, but the said Bradford refused to make such order until after the termination of the suit. See affidavit of Chas. C. Miller and docket entries.

Deponent further says that on the 2nd of January, at about 12.45 P.M. he filed with the Clerk, in the presence of the prisoner, the affidavit, certificate and application attached to said petition, and on the demand of the Clerk paid him his fees for filing the same, and he accepted the said papers and they were so filed.

That on the 6th of January the court assembled at about 12 o'clock noon, and the said Bradford immediately proceeded to read the orders hereinbefore set forth at the conclusion of which deponent arose, protested against the action of said Bradford, on the ground that he was disqualified by the affidavit and was without jurisdiction, and refused to proceed further, and requested that his protest against said Bradford's unlawful conduct should be entered upon the minutes of the Court, and notwithstanding that said Bradford assumed unlawfully to overrule the motion for a new trial and motion in arrest of judgment then pending in said cause, and proceeded over the protest of the prisoner to enter
19 judgment upon the verdict, and to sentence the defendant to imprisonment in the Atlanta Penitentiary.

JNO. C. FAY.

Sworn and acknowledged before me this 22 day of March 1912.

J. D. STEWARD,
Dep. Clk. U. S. Dist. Ct.
N. D. Ga.

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Clerk's Office
U. S. Circuit and District Courts
District of Delaware,
Wilmington.

Wm. G. Mahaffy,
Clerk.

JOHN C. FAY, Esq.,
Corcoran Building,
Washington, D. C.

October 27, 1911.

DEAR SIR:—

I have your telegrams of even date to me and to my deputy. I sent to you yesterday a copy of the minute entries in the Glasgow cases by mail, and now enclose a certified copy of these minutes, per your request in the above telegram.

With respect to the report of Monday's proceedings spoken of in your telegram to my deputy, I beg to advise that it is not the practice in this district to take the proceedings and furnish copies of the character mentioned in your telegram. I cannot undertake to furnish to you a copy of the memoranda that I caused to be taken to aid me in correctly entering upon the minutes the proceedings before the Court.

Yours very truly,
(Sgd.) WM. G. MAHAFFY,
Clerk.

P. S. The fees for above copies amount to $2.70.

W. G. M.

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EXHIBIT F.

Form 23 5000. 12, '10.

Persons corresponding with prisoners will carefully observe the following directions, viz.: Write plainly in English, confine yourself strictly to family and business matters. In directing letters, put prisoner's name and cell number plainly on envelope. Stamp properly to insure delivery. All letters are examined. No daily papers, food, or wearing apparel will be admitted. Friends may write as often as they wish. Prisoners may write but once in four weeks, and see their wives once in two weeks, and relatives once in four weeks. Visitors are not admitted to institution or permitted to see inmates on Holidays, Sundays or Saturdays.

L. CRAWFORD, Warden.

New Castle County Workhouse, Greenbank, Del.

Put your Name and Cell No. here

Name, J. Wesley Glasgow
Greenbank
Cell No., Marshallton, Del.

Put full address of your Letter here

Hon. John C. Fay
Third Floor Corcoran Bldg.
Washington, D. C.

Sept. 28, 1911.

DEAR JUDGE:

I received your letter on Saturday night, and I can assure you that it made my heart leap for joy. I had been feeling pretty blue for the past two weeks but your letter raised me from the Valley of Despond and carried me to the Mount of Ecstasy.

I think that was a very fine letter which you wrote to the District Attorney. I am convinced that if you are as efficient in the art of persuading juries as you are in the art of writing letters, my case is won. Your letter covered very fully every point discussed in our interview on Sept. 9th. I am sorry to say that the District Attorney hasnt complied with your request and released me on my own recognizance for I am still in bondage. I have been in captivity ten weeks today. It has seemed to me more like ten years.

I have written him four times for permission to obtain permission to procure the exhibits for the defense that are in my trunk and the fact that he failed to answer any of these leads me to believe that he now realizes what awful blunders they made and has no intention of drawing up any indictment.

I do not know what you told Mr. Hitchcock and Mr. Wickersham during the course of your interview but this I do know; if they understood the situation fully they would strain every nerve to prevent an indictment and thus save the Government a tremendous scandal. I can assure you that it will be the most sensational trial held in a Federal Court room in ten years. I do not know what evidence the prosecution intends to introduce but this I do know that when the jury learns what
22 tactics the prosecution has used in order to secure my conviction, they will have little sympathy for them. If this case ever comes to trial it will make me famous and my enemies notorious.

So my sixteen page letter to Mr. Hitchcock and the record of 22 missing letters were not enclosed. Dont worry on that score. My trial will be postponed indefinitely until I get an answer to that letter. And this report on the twenty missing letters will be one of the exhibits for the defense.

23 EXHIBIT G.

From The Evening Journal, Wilmington Delaware.
January 6, 1912.

LASHED ON BARE BACKS IN BITING COLD.

Horse Blankets Protect Men While Awaiting Carrying out of Sentence. Hands In Gloves While At The Post.

With the thermometer at 10 degrees above zero six men, one of them white, stood barebacked at the whipping post in the workhouse yard this morning and received their lashing sentences for larceny. The men were at the post but a few seconds, the longest time required to whip one being about two minutes.

Owing to the extreme cold weather there were but six persons in the yard to witness the whippings. While they were busy stamping their feet from the cold, the prisoners also appeared to be suffering from the weather.

It required just half an hour to lay on the lashes and after the men were assembled in the tunnel with their backs bared, they were taken out separately with a large horse blanket around their shoulders. Their hands were then covered with gloves and were strapped to the post

and with the blanket around their shoulders the sentence meted to them by the Court of General Sessions was read. This done, the blanket was removed and Warden Crawford laid on the lashes.

Haywood Spittle, colored, convicted of larceny, appeared to suffer the most. He received twenty lashes and at the falling of the first one he flinched. At the third he was twiching and from then until the last he squirmed and at times almost turned around. His eyes were filled with tears as he looked piteously at the Warden. Spittle was sentenced to serve two months in addition to receiving the lashes.

Howard Morris, the only white man to be whipped, received ten lashes and his back showed the marks plainly. He flinched when the "cat" first fell and once he uttered a sob.

Charles Lewis, colored, convicted of larceny, took his twenty lashes without a quiver. He is to serve two years imprisonment.

Samuel Richardson, colored, convicted of stealing chickens, approached the post with a smile. He was whipped with fifteen lashes, but he did not appear to mind it, although he was not smiling when he was released from the post. Richardson will serve two years.

Claude Bryan, colored, received ten lashes and will serve one year, having been convicted of larceny.

George Dutton, Colored, flinched when the third of his ten lashes fell and sighed when the ordeal was over.

FIFTEEN MONTHS IN PRISON FOR GLASGOW.

Judge Edward G. Bradford, in the United States Court today, denied the motion for a new trial, also the motion for arrest of judgment, made by John C. Fay, a Washington attorney, counsel for J. Wesley Glasgow, convicted in that tribunal of sending objectionable literature through the mails. At the same time Judge Bradford replied to the affidavit filed several days ago by Glasgow, through his attorney, in support of his application practically asking for the retirement of Judge Bradford from the case, principally on the ground that bias was alleged to have been shown by the Court towards the defendant.

Judge Bradford's remarks came unexpected to Mr. Fay who was present and the latter hesitated for a moment before addressing the Court.

24 Judge Bradford's remarks were made without hesitation and his demeanor while on the bench plainly showed how the affidavit in question had affected him. He said he would not even refer to the paper and while overruling the motion, he could not refrain from making a statement. The court said that the affidavit in question as counsel for the defendant knows, were absolutely false and malicious. The court sentenced Glasgow to pay a fine of $500 and be imprisoned in the penitentiary at Atlanta, Georgia, for fifteen months.

After Judge Bradford made his statement Mr. Fay entered a protest to the proceedings going any further.

Before being sentenced Glasgow, in a statement to the court, also made protest against any further proceedings. The court then imposed sentence.

25 From The Washington Post, Washington, D. C.
March 3, 1912.

MAN WEEPS UNDER LASH

Brave Until Thirtieth Blow, Then His Courage Gives Way.

Member of Prominent Delaware Family Convicted of many Burglaries, has Another whipping coming.

Special to The Washington Post.

Wilmington, Del., March 2.—Richard Wright, a white man and member of a well-known family of Kent county, Del., was whipped with 40 lashes on the bare back at the Newcastle county workhouse today. He was convicted at Dover this week of committing a large number of the burglaries along the line of the Delaware Railroad, and was sentenced to 4 years imprisonment and 70 lashes. The remaining 30 will be administered next Sunday.

The victim was brave today until the thirtieth lash descended. Then he began to squirm. When the lash fell for the fortieth time he was crying. The whipping took place in the open air, although the mercury stood at 26 degrees and a biting wind was blowing.

Fred W. Jackson, William B. Ennis, Charles Walters, and Andrew Tillman, all negroes, convicted of robberies, were each given twenty lashes.

26 ## EXHIBIT H.

In the District Court of the United States
in and for the District of Delaware.

No. 1. September Term 1911.

Violation Act March 4, 1909, C. 321. Sec. 211.

THE UNITED STATES OF AMERICA

vs.

JOHN WESLEY GLASGOW, alias JOHN WESLEY CONYNGHAM GLASGOW.

DISTRICT OF DELAWARE, *ss.*

1. The Grand Jurors of the United States of America, inquiring in and for the District of Delaware, upon their respective oaths and affirmations, respectively do present: That heretofore, that is to say, on the twentieth day of July in the year of our Lord, one thousand nine hundred and eleven, John Wesley Glasgow, alias John Wesley Conyngham Glasgow, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, that is to say, at the City of Wilmington, New Castle County and State of Delaware, then and there, unlawfully and feloniously did knowingly deposit and cause to be deposited in the Post Office of the said City of Wilmington for mailing and delivery by the Post Office Establishment of the said United States

certain non-mailable matter, that is to say a certain obscene, lewd and lascivious book; which said book then and there was entitled "Personal Purity and Sexual Science" and was bound in a purple colored cover and, then and there, on a certain page thereof, that is to say, on the title page were printed the words and figures following, that is to say, "Personal Purity and Sexual Science—Including Anatomical Illustrations and Obstetric Operations, also a Series of Engravings Illustrating the Formation of Life, Growth of the Embryo, Development of the Foetus, and the Caesarean Operation By Prof. Benjamin Franklin Stratton Assisted by A Number of Eminent Physicians, Lawyers and Reformers—Ninth Edition—Published By J. W. Glasgow, Evanston, Illinois—1911," and, then and there, contained numerous pages, that is to say, one hundred and fourteen pages with certain pictures and
27 illustrations therein and thereon; and which said book is so obscene, lewd and lascivious, that the same would be offensive to the court here and improper to be spread upon the records thereof, wherefore the Grand Jurors aforesaid do not set forth the same in this indictment; and the said John Wesley Glasgow, alias John Wesley Conyngham Glasgow, then and there, had knowledge, information and notice of the contents of said book; and said book, then and there, was enclosed in a paper wrapper, which said wrapper, then and there was addressed and directed as follows, that is to say; "Mr. Frank Wolf, 1215 Court Street, Scranton, Pa." contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the said United States.

2. The Grand Jurors aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, respectively do further present; that heretofore, that is to say, on the twentieth day of July in the year of our Lord one thousand nine hundred and eleven, John Wesley Glasgow, alias John Wesley Conyngham Glasgow, late of the district aforesaid, at the District aforesaid and within the jurisdiction of this court, that is to say, at the City of Wilmington, New Castle County and State of Delaware, then and there, unlawfully and feloniously did knowingly deposit and cause to be deposited in the Post Office of the said City of Wilmington, for mailing and delivery by the Post Office Establishment of the said United States certain non-mailable matter, that is to say, a certain obscene, lewd, lascivious and indecent book and publication; which said book and publication then and there was entitled "Personal Purity and Sexual Science" and was bound in a purple colored cover and, then and there, on a certain page thereof, that is to say, on the title page were printed the words and figures following, that is to say, "Personal Purity and Sexual Science—Including Anatomical Illustrations and Obstetric Operations, also a Series of Engravings Illustrating the Formation of Life, Growth of the Embryo, Development of the Foetus, and the Caesarean Operation by Prof. Benjamin Franklin Stratton Assisted by a number of Eminent Physicians, Lawyers and Reformers—Ninth Edition —Published by J. W. Glasgow, Evanston, Illinois—1911," and, then and
28 there, containing numerous pages, that is to say, one hundred and fourteen pages with certain pictures and illustrations therein and thereon; and which said book and publication is so obscene, lewd, lascivious and indecent that the same would be offensive to the court here and improper to be spread upon the records thereof, wherefore the

Grand Jurors aforesaid do not set forth the same in this indictment; and the said John Wesley Glasgow alias John Wesley Conyngham Glasgow, then and there had knowledge, information and notice of the contents of said book and publication; and said book and publication, then and there was enclosed in a paper wrapper, which said wrapper, then and there, was addressed and directed as follows, that is to say, "Mr. Frank Wolf, 1215 Court Street, Scranton, Pa."; contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the said United States.

(Sgd.) JOHN P. NIELDS,
United States Attorney.
District of Delaware.

A true copy.
Attest; WM. G. MAHAFFY, *Clerk.*
by H. C. MAHAFFY, JR., *Deputy.*

29

EXHIBIT I.

STATE OF DELAWARE }
NEW CASTLE COUNTY } *ss.*

BE IT REMEMBERED, that on this fifteenth day of March, A. D., 1912, personally appeared before me, George W. Dorsey, Jr., a Notary Public for the State of Delaware, Chas. Colden Miller, known to me personally to be such, who being by me first duly sworn according to law, deposes and says:

That he is a member of the bar of the District of Columbia, and of counsel in the case of United States vs. J. Wesley Glasgow in the United States District Court for the District of Delaware. That on or about the twenty-first day of November, 1911, he filed and presented to the court in said District an application in behalf of said Glasgow for the issuance of a commission to take testimony in behalf of said defendant in the Cities of Washington, D. C., and Chicago, Illinois, together with an affidavit made by said Glasgow to the effect that he expected the witnesses named in said application to give evidence material to his defence; that he was without means to bring said witnesses before the court to testify in his behalf, and that justice would not be done him if he were deprived of their testimony. Affiant further states that upon consideration of said application and affidavit by the Honorable Edward G. Bradford, United States District Judge, said Judge declined said application and gave his reasons therefor in the following language: "That on the assumption that the Court, against the consent of the United States Attorney, possesses the power to award a Commission dedimus potestatem, a proper case has not been made for the exercise of that power; and on the further ground that the court does not possess the power to do it in any circumstances without the permission of the United States District Attorney."

30 Affiant further says that he was present in court on or about the sixteenth day of December, 1911, and heard John C. Fay, of counsel for said Glasgow, make application to the Court for an order instructing the United States Attorney to deliver to him certain books and papers belonging to the defendant upon the ground that the same constituted

material evidence in said Glasgow's defence, and that the court refused to do so until after the jury had brought in its verdict.

CHAS. COLDEN MILLER.

Sworn to and subscribed before me the day and year first above written.

[SEAL] GEORGE W. DORSEY, JR.,
Notary Public.

31 EXHIBIT K.

In The District Court of the United States for the District of Delaware.

THE UNITED STATES OF AMERICA,
vs.
JOHN WESLEY GLASGOW, alias JOHN WESLEY CONYNGHAM GLASGOW.

No. 1. September Term 1911.
Violation Act March 4, 1909.
C. 321, Sec. 211.

Docket Entries.

Octo. 16, 1911. The Grand Jury return "A true bill"; same day filed.

Octo. 17, 1911. Order for arraignment, and defendant arraigned.

Octo. 17, 1911. Defendant pleads "Not Guilty"; same day order granting leave to withdraw plea on or before 23rd instant, at 10 o'clock A.M. and file motion to quash, demurrer etc.

Octo. 17, 1911. Order denying defendant's motion to fix amount of bail at $500 and remanding defendant to custody of Marshal.

Octo. 23, 1911. Defendant moves the court for an order extending time for withdrawal of plea and substitution of motion to quash, demurrer etc.

Octo. 23, 1911. Counsel for defendant asks leave to file affidavit of defendant relative to treatment in New Castle County Workhouse to apprise the court of the state of affairs; same day leave declined by the court unless in connection with application by defendant for relief; same day defendant declined to make such application.

UNITED STATES OF AMERICA, }
DISTRICT OF DELAWARE. } *ss.*

I, William G. Mahaffy, Clerk of the District Court of the United States for the district of Delaware, do hereby certify that I have carefully compared the foregoing writing with the original docket entries in the case of United States vs. John Wesley Glasgow, alias John Wesley Conyngham Glasgow, No. 1, September Term 1911 and the same is a

true and correct copy of said docket entries, so full and complete as the same now remain of record in my office.

[SEAL] In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Wilmington in said district this twenty seventh day of October, A D 1911.

WM. G. MAHAFFY,
Clerk.

32 UNITED STATES OF AMERICA, } ss.
DISTRICT OF DELAWARE. }

I, William G. Mahaffy, Clerk of the District Court of the United States for the district of Delaware, do hereby certify that I have carefully compared the annexed five typewritten pages with that portion of the original docket entries in the case of The United States of America v. John Wesley Glasgow, alias John Wesley Conyngham Glasgow, No. 1, September Term 1911, appearing on the Criminal Docket of said court under the title of said cause from October 23, 1911 to the day of the date hereof, and find the same to be a true and correct copy thereof, so full and complete as the same now remains of record in my office.

[SEAL] In witness whereof I have hereunto set my hand, and affixed the seal of said court at Wilmington, in said District, this fifteenth day of March, A. D. 1912.

WM. G. MAHAFFY,
Clerk.

33 *Docket Entries.*

In the District Court of the United States for the District of Delaware.

THE UNITED STATES OF AMERICA, *vs.* JOHN WESLEY GLASGOW, alias JOHN WESLEY CONYNGHAM GLASGOW.	No. 1, September Term 1911. Violation Act March 4, 1909, C. 321. Sec. 211.

Octo. 23, 1911.	Defendant moves the court for an order extending time for withdrawal of plea and substitution of motion to quash, demurrer etc.
Octo. 23, 1911.	Counsel for defendant asks leave to file affidavit of defendant relative to treatment in New Castle County Workhouse, to apprise the Court of the state of affairs; same day leave declined by the Court unless in connection with application by defendant for relief; same day defendant declined to make such application.
Nov. 1, 1911.	Order granting leave to withdraw plea of "Not Guilty" and to file in lieu thereof plea to jurisdiction; same day plea of "Not Guilty" withdrawn and plea to jurisdiction filed, and same set for hearing on November 7, 1911, at 11 o'clock A.M.

Nov. 7, 1911. District Attorney asks leave to file demurrer to said plea and thereafter withdrew his request for leave to file demurrer and same day presented a written motion to strike out plea to jurisdiction.

Nov. 8, 1911. Order granting leave to defendant to forthwith withdraw plea to jurisdiction and substitute demurrer; same day defendant declined to avail himself of such leave to withdraw plea to jurisdiction; same day motion of United States to strike out said plea, filed.

Nov. 8, 1911. Counsel for defendant move the court to discharge defendant; same day order denying said motion.

Nov. 8, 1911. Hearing on plea to jurisdiction and motion to strike out same.

Nov. 10, 1911. Order overruling plea to jurisdiction.

Nov. 10, 1911. Motion of defendant to quash indictment filed; same day order denying same without prejudice to defendant being heard on demurrer to indictment.

Nov. 10, 1911. Defendant's demurrer to indictment, filed; same day order that argument on demurrer be heard on November 14, 1911, at 11.30 o'clock A.M.

Nov. 14, 1911. Joinder in demurrer, filed.

Nov. 14, 1911. Defendant moves the court to postpone argument on demurrer; same day order denying said motion.

Nov. 14-15, 1911. Argument on demurrer.

Nov. 20, 1911. Order overruling demurrer and that defendant plead to indictment.

Nov. 20, 1911. Motion of defendant to require Grand Jury to return a bill of particulars, with affidavit of defendant annexed, filed; same day order denying said motion etc.

34 Nov. 20, 1911. Motion of defendant to require bill of particulars etc. with affidavit of defendant annexed, filed; same day hearing continued until tomorrow at 10 o'clock A.M.

Nov. 21, 1911. Hearing on said motion for bill of particulars; same day order that U. S. Attorney furnish to defendant in open court at 2.30 o'clock P.M. this day, a bill of particulars, and at said time said bill of particulars was delivered to defendant.

Nov. 21, 1911. Defendant pleaded "Not Guilty" to said indictment.

Nov. 21, 1911. Defendant's written motion for issuance of commission *dedimus potestatem*, with his affidavit annexed filed; same day hearing on said motion; same day order denying said motion.

Nov. 21, 1911.	Defendant's written motion to direct U. S. Attorney to deliver to defendant certain papers, clothing etc. filed, same day, with assent of defendant, no order is made thereon.
Nov. 21, 1911.	Defendant's written motion to amend minutes of the proceedings of October 17, 1911, and to direct clerk to furnish defendant with copy of the stenographic report made by the deputy clerk of the proceedings on October 23, 1911 and November 1, 1911, presented.
Nov. 21, 1911.	Defendant moves the court to continue the trial of said cause until the next term of said court; and District Attorney opposes said motion; same day order containing trial of said cause until December 12, 1911, at 11.30 o'clock A.M.
Dec. 12, 1911.	Order that motion of defendant to amend minutes and that clerk furnish copies etc. presented November 21, 1911 be filed; same day order denying said motion.
Dec. 12, 1911.	Affidavit of defendant, filed; same day defendant moves the court for order for summoning of witnesses in his behalf; same day order thereon and said order filed.
Dec. 12, 1911.	Trial.
Dec. 13, 1911.	Trial.
Dec. 14, 1911.	Trial.
Dec. 15, 1911.	Trial.
Dec. 16, 1911.	Trial. Verdict "Guilty."
Dec. 16, 1911.	Defendant gives notice of his motion for new trial and in arrest of judgment; same day order that said motions and reasons be filed on or before 21st. inst.
Dec. 21, 1911.	Defendant's motions in arrest of judgment and for new trial filed.
Dec. 23, 1911.	Order setting motions for new trial and in arrest of judgment down for hearing January 6, 1912, at 11.30 o'clock A.M.
Jany. 6, 1912.	Leave to file affidavit of defendant, with certificate of counsel annexed, denied.
Jany. 6, 1912.	Order denying motions for new trial and in arrest of judgment.
Jany. 6, 1912.	Motion for judgment; same day.

Sentence.

That defendant forfeit and pay to the United States a fine of $500 and be imprisoned in United States Penitentiary at Atlanta, Georgia, for the term of fifteen months, beginning on this 6th day of January, A. D. 1912 and ending on the fifth day of April, A. D. 1913.

Jany. 6, 1912. Commitment issued.

Jany. 10, 1912. Marshals returns on commitment "Served" &c. same day writ filed.

35 In the United States District Court for the District of Delaware, the 21st day of Dec., 1911.

THE UNITED STATES
vs.
J. WESLEY GLASGOW, etc. } Crim. Doc. No. 1.

Motion in Arrest of Judgment.

Comes now the defendant, after verdict and moves the Court to arrest the entry of judgment upon verdict and assigns as reasons therefor:

For Errors of Law.

1st. That the Court is not clothed with jurisdiction to entertain, or render judgment against the defendant, for that the indictment does not charge any crime against the United States, nor does section 211 of the penal code make the doing of any of the acts described in said indictment unlawful, or a crime against the U. S.

2nd. That said Sec. 211, and the indictment thereunder is in derogation of the rights and constitutional guarantees of the defendant. *a.* In that it abridges the freedom of the press; *b.* In that it fails to inform the defendant of the nature of the offence with which he is charged; *c.* In that it is an ex post facto law. *d.* In that it is void for uncertainty.

3rd. That the rulings of the Court were in derogation of the Constitutional guarantees and rights of the defendant. (1) In that the presiding Judge permitted evidence obtained in violation of the provision forbidding unreasonable searches and seizures to be introduced to the defendant's detriment. (2) In that he likewise refused to require the Grand Jury to describe in its indictment with reasonable certainty the
36 nature of the offence charged, so as to apprize the defendant thereof, as well as to apprize the petit jury of the offense they were to try. (3) In permitting the attorney for the United States, by a bill of particulars to substitute for the indictment of the Grand Jury, practically an indictment or information, by the Attorney for the United States.

4th. In that the Court erred in instructing the Jury, that under the indictment, charging the act complained of to have been "feloniously" done, that a criminal intent was not an element of the offence thereunder, thereby causing a fatal variance between said verdict and the offence charged in the indictment.

5th. For other matters to be shown at the hearing.

Wherefore the defendant moves the Court to arrest the Judgment, and that all said proceedings be for naught held and the defendant be hence discharged from his imprisonment.

JOHN C. FAY,
Attorney for Defendant.

CHAS. C. MILLER
of Counsel.

37 In the United States District Court for the District of Delaware, the 21st day of Dec., 1911.

THE UNITED STATES
vs.
J. WESLEY GLASGOW, etc. } Crim. Doc. No. 1.

Motion for a New Trial.

Comes now the defendant after verdict and moves the Court to set aside the verdict and grant the defendant a new trial and assigns as reasons therefor.

1st. That there was no legal admissible evidence upon which to found the said verdict, all evidence having been obtained in violation of defendant's constitutional right.

2nd. That said verdict was contrary to the instructions of the Court, in that they were instructed to consider only the evidence, and there was none, as set forth in point 1.

3rd. That the jury failed to give to defendant the presumption of innocence as required by instructions of the Court.

4th. For errors of law committed by the Court, as set forth in the motion in arrest and in the exceptions of defendant noted at the time upon the minutes of the presiding Judge.

5th. For misbehavior of the Attorney of the United States in the presence of the jury which tended unlawfully to create a prejudice against the defendant, in his endeavor to introduce irrevelant and inadmissible evidence, under the guise of its introduction for a limited purpose, and using it for an ulterior purpose, than that for one for which it was admissible.

6th. For refusing to accept the defendant's offer to admit that the
38 defendant knew the contents of the book, and calling witnesses to prove the fact and seeking by language employed by such witnesses or their description of the incidents attending their knowledge of the defendant's knowledge of the contents of the book to get before the jury inadmissible matter that tended to create a bias or prejudice against the defendant, and commenting thereon before the jury.

Wherefore the defendant moves the court to set aside the verdict and to award the defendant a new trial.

JOHN C. FAY,
Attorney for Defendant.

CHAS. C. MILLER
of Counsel.

NORTHERN DISTRICT OF STATE OF GEORGIA. } ss.

John C. Fay being duly sworn says that the annexed motions in arrest of judgment and for a new trial are true copies of the originals by him filed in the United States District Court for the District of Delaware and which were pending and undisposed of on the 2nd day of January 1912.

JNO. C. FAY.

Sworn to and subscribed before me this 22 day of March 1912.

39 UNITED STATES OF AMERICA
DISTRICT OF DELAWARE

I, J. Wesley Glasgow, do hereby solemnly swear that I am the defendant in the above entitled cause now pending in said Court and in the proceedings thereunder, that there is now pending therein certain proceedings, to wit, a certain motion for a new trial, and a motion in arrest of judgment, and hearings thereon have been fixed for January 6th, 1912 before Honorable Edward G. Bradford, United States District Judge for the District of Delaware; defendant further upon this oath says that the said Honorable Edward G. Bradford, the said Judge before whom the said proceedings are to be heard or tried as aforesaid, has both a personal bias, and a personal prejudice against him, and also a personal prejudice and bias in favor of John P. Nields, Esquire, United States Attorney for the District of Delaware who is the Attorney representing the United States in said proceedings, and the facts and the reasons for his belief that such bias or prejudice exists are,

First. That said Judge caused his arraignment within twenty-four hours of his indictment, and required him to plead immediately without he or his counsel having had opportunity to read the indictment and refused him a reasonable time in which to withdraw his plea and demur or otherwise attack the validity of the indictment, allowing only four days for the purpose, less than one half the time allowed in said Court in a civil suit to plead or demur to a declaration, and the time allowed at common law.

Second. That when apprised of the fact on the day of his arraignment that he had immediately on his arrest and before his indictment had been stripped of his clothes and dressed in penitentiary clothes, and had been
40 deprived of seeing the newspapers, fed on prison fare, his communication to and with counsel either unmailed or opened and read and that he was still subjected to the same treatment, said Judge refused to interfere and permitted such treatment to continue asserting that he had no authority to interfere.

Third. In permitting John P. Nields, United States Attorney, to withhold and suppress certain papers necessary and important to him for his defence, which he had unlawfully seized and taken possession of, and refused when applied to, to require the said Attorney for the United States to return the same to him until after the conclusion of the trial thereby depriving him of valuable and material evidence in his defense.

Fourth. That the said Judge, being informed that his letters to counsel, and letters from counsel were being opened and read by persons in whose custody he was, and while under protection of the Court, refused to

permit affidavits establishing such violation of his constitutional rights to be filed, or to take any action thereon, and when informed that the United States Marshal refused to allow him to confer with counsel except in his presence and hearing, refused to direct the Marshal to permit him to have a private interview, but referred his counsel to the United States Attorney for relief, and when informed that Deputy Marshal had assaulted him in the Court room, refused to take notice of complaint because it did not occur in the presence of the Court, but immediately after adjournment.

Fifth. That said Judge by arbitrary and unjust ruling deprived him of two peremptory challenges to Jurors, allowing him to exercise the right of peremptory challenge in eight cases only instead of ten as allowed him by law.

Sixth. That said Judge refused to permit a dedimus potestatem to issue to take the testimony of witnesses material in his defence, alleging
41 from the Bench as ground for said refusal that he would not allow a dedimus to issue "without the permission of the District Attorney," and the District Attorney in open Court refused said permission.

And defendant on oath further says for cause why the foregoing affidavit was not filed "not less" than ten days before the beginning of the present term of the Court, that said Act permitting the filing of the same did not become operative or go into effect until the first day of January, A. D. 1912, and the first opportunity to file the same occurred this day.

J. WESLEY GLASGOW.

On this second day of January, A. D. 1912 before me personally came J. Wesley Glasgow, the defendant in the said proceedings, and made oath before me in due form of law, upon the Holy Evangels of Almighty God to the foregoing affidavit by him subscribed is true. Witness my hand and the seal of said Court the day and year aforesaid.

WM. G. MAHAFFY,
[SEAL] *Clerk U. S. District Court,*
District of Delaware.

Certificate of Attorney of Record.

THE UNITED STATES OF AMERICA
DISTRICT OF DELAWARE

I, John C. Fay, do hereby certify that I am the counsel and Attorney of Record for J. Wesley Glasgow, the defendant in above entitled cause, and I do further certify that I know the contents of the foregoing affidavit, and the application and affidavit are made in good faith. Dated Wilmington Delaware, January 2d, 1912.

JNO. C. FAY,
Attorney of Record.
CHAS. C. MILLER,
Of Counsel.

41½ NORTHERN DISTRICT OF GEORGIA.

I, John C. Fay being duly sworn say that on the 2nd day of January 1912 in the presence of J. Wesley Glasgow and Eugene A. Hardesty and

others I delivered the original of this paper to Wm. G. Mahaffy in the Clerk's office of the United States District Court for the District of Delaware and paid to him on his demand his lawful fees for filing the same and he received and accepted the same as clerk of said Court.

JNO. C. FAY.

Sworn & subscribed before me this 22 day of March 1912.

J. D. STEWARD, *Deputy Clerk U. S. Dist. Ct. N. D. Ga.*

42 EXHIBIT L.

In the United States District Court
For the District of Columbia

THE UNITED STATES *vs.* J. WESLEY GLASGOW } No. 1, September Term, 1911. Criminal docket No.

Comes now J. Wesley Glasgow in proper person and makes and files in this cause the annexed affidavit under the provisions of Section 24 of an act of Congress entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3d, 1911, and which Act took effect and became in force on and after January 1st, 1912, and requests the Court to forthwith order the same to be entered on the records of the Court, and order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for the 3rd circuit, now present in said circuit in accordance with the requirement of Section 20 of the Act aforesaid.

(Sgd.) J. WESLEY GLASGOW.

JNO. C. FAY,
C. C. MILLER,
Of Counsel.

43 EXHIBIT M.

U. S. District Court Saturday, January 6, 1912.

The Court met pursuant to adjournment and was open by the Judge for business.

Present:

HON. EDWARD G. BRADFORD, U. S. District Judge.

THE UNITED STATES OF AMERICA *vs.* JOHN WESLEY GLASGOW, alias JOHN WESLEY CONYNGHAM GLASGOW. } No. 1. September Term, 1911.

Present:

John P. Nields, Esq., United States Attorney.
John C. Fay, Esq., Attorney for defendant.
Defendant in custody of the Marshal.

This being the day heretofore set down for hearing the motion for a new trial and the motion in arrest of judgment, filed by the defendant in

the above entitled cause on the twenty first day of December, A. D. 1911, the court announced that before proceeding further in this case the court desired to make a statement, which statement was made by the court, as follows:

44 On the morning of Thursday last, on arriving at my rooms in this building after an absence of several days from the State, the clerk of this court, Mr. Mahaffy, called my attention to a certain affidavit made by the defendant and certified to by his counsel, Mr. Fay, which had been delivered to him, Mr. Mahaffy, to be filed ostensibly pursuant to section 21 of the act of Congress of March 3, 1911, entitled "An Act to codify, revise and amend the laws relating to the judiciary." (36 Stat. Part 1, page 1087). Section 21, among other things, provides that "whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, the judge shall proceed no further therein, but another judge" shall be designated or chosen as elsewhere prescribed in the act "to hear such matter"; and further "every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists" and shall be "accompanied by a certificate of counsel of record that such affidavit and application are made in good faith." On being asked by the clerk for instructions in the matter I directed that the affidavit be not filed until the further order of the court.

In the judgment of the court, whatever may be the applicability of the section to other cases differently circumstanced, it does not and was not intended by Congress to apply to this case at its present stage, and consequently there was no authority or justification for the filing of such an affidavit as that in question.

45 But the dignity of the court and the respect properly due to it demand that more than a passing notice be taken of this incident. This unauthorized affidavit sets forth that the judge of this court "has both a personal bias, and a personal prejudice" against the defendant, and
46 also "a personal prejudice and bias in favor" of the United States Attorney for the district of Delaware, and proceeds to allege so-called facts and reasons for the asserted belief of the defendant in the existence of such bias or prejudice. I shall not compromise the properties of this occasion by referring in detail to the contents of the affidavit. It contains absolutely no allegation bearing on bias or prejudice that is not grossly misleading, wilfully distorted or absolutely false, and the senior counsel for the defendant knows, as this court knows, and as the proceedings in the trial of the case will disclose, that every such allegation is grossly misleading, wilfully distorted or absolutely false. If the averments in that affidavit were true I should be not only unfit to sit in this case, but unworthy of filling any judicial office. And yet he has seen fit formally to certify that he knows the contents of the affidavit and that the application and affidavit are made in good faith. In the judgment of this court,—and I extremely regret to feel compelled to say it,—any lawyer who could be so oblivious to the obligations of his official oath as to append such a certificate to such a false and infamously unfair affidavit, knowing the contents, displays a degree of professional and moral turpitude which should leave him no place among honorable

practitioners at the bar of this or any other judicial tribunal. Whatever may be the code of professional ethics elsewhere we are to be congratulated that hitherto the legal profession in Delaware has been free from such contaminating influences or practices. And what accentuates the ingratitude and baseness of such an assault upon the judicial reputation
47 of one who, whatever his failings or shortcomings, has always tried to be fair and impartial as between litigants in the administration of justice, criminal and civil, is the fact that if section 21 of the act in question be applicable to this case, which as the court has determined it is not, the judge has no protection whatever against a false and perjured affidavit, and his reputation as a fair and impartial dispenser of justice goes for nothing, and is absolutely at the mercy of any litigant who, either of his own motion or at the instigation of unscrupulous counsel charges bias or prejudice against him. The mouth of the judge is sealed; he is not permitted to deny or refute the allegations made against him, whatever may be their falsity or whatever his reputation as a just and impartial judge, or howsoever gross the depravity of the affiant. On the above assumption, upon the filing of such an affidavit the judge, without any opportunity for a hearing on the question of his alleged bias or prejudice, is summarily removed from the case on the ground of bias or prejudice and his reputation, which is his property and most valued possession, blasted in the eyes of the community, who, without understanding the peculiar character of the law under which the judge is removed, but knowing that he has been accused of bias or prejudice, naturally conclude that such a charge has been satisfactorily established against him when, in point of fact his mouth and the mouths of witnesses on whom he might otherwise rely, are absolutely sealed. But this court cannot impute to Congress an intent that a convicted felon should be able to oust the judge before whom he was tried from further proceeding in the case.

48 It is abhorrent to one's sense of justice that judicial reputations should be at the mercy of convicted criminals whose false affidavits the judges are not permitted to refute. A judge's reputation is his property of which he should not be deprived without due process of law. The affidavit in question is false, insulting and malicious, and, as it is unauthorized by the law, it has no proper place among the files of this court.

49 Thereupon, said motions for a new trial and in arrest of judgment were ordered by the court for hearing and John C. Fay, Esq. Attorney for said defendant, stated to the court that in view of the affidavit and in view of the law he thought that His Honor, Judge Bradford, was not entitled to proceed further in this case, and that he should not compromise the rights of his client by appearing further before His Honor; and John P. Nields, Esq. United States Attorney for the district of Delaware, stated to the court that he did not desire to argue the motions and was content that the court should dispose of them.

Whereupon, Mr. Fay asked the court to enter his protest upon the records of the court.

Thereupon, on reading and considering the motion of said defendant to set aside the verdict and award the defendant a new trial, and the reasons assigned therefor, it is ordered by the court that the said motion be and the same hereby is denied.

Thereupon, on reading and considering the motion of the defendant to arrest the entry of judgment upon verdict and the reasons assigned therefor, it is Ordered by the court that said motion be and the same hereby is denied.

Whereupon, the United States of America by John P. Nields, Esq. United States Attorney for the District of Delaware moves the court for judgment.

Thereupon, the defendant stood up and the court asked him if he had anything to say why sentence should not be pronounced upon him.

Whereupon, the said defendant consulted with John C. Fay, Esq. his attorney, and stated to the court that he protested against any further proceedings on the part of His Honor, Judge Bradford, in this case.

Sentence.

And it appearing to the court that the jury has found the said John Wesley Glasgow alias John Wesley Conyngham Glasgow Guilty in manner and form as he stands indicted in the indictment returned against him in the above entitled cause on the sixteenth day of October, A. D.
50 1911, it is considered and adjudged by the court now here that you, John Wesley Glasgow alias John Wesley Conyngham Glasgow, do forfeit and pay to the United States a fine of five hundred dollars ($500) and the costs of this prosecution; and further, that you John Wesley Glasgow alias John Wesley Conyngham Glasgow be imprisoned in the United States Penitentiary at Atlanta, Georgia for the term of fifteen months, beginning on the sixth day of January A. D. 1912, and ending on the fifth day of April, A. D. 1913.

And it is further considered, adjudged and ordered by the court now here that you John Wesley Glasgow alias John Wesley Conyngham Glasgow, be now committed to the custody of the United States Marshal for the district of Delaware, in order that the foregoing sentence may be carried into execution.

* * * * *

The court adjourned until Monday next at ten o'clock A.M.

(Sgd.) WM. G. MAHAFFY,
Clerk.

UNITED STATES OF AMERICA)
DISTRICT OF DELAWARE.) *ss.*

I, William G. Mahaffy, Clerk of the District Court of the United States for the district of Delaware do hereby certify that I have carefully compared the foregoing typewritten pages with the entries on the Minutes of said court relative to the case of the United States of America vs. John Wesley Glasgow, alias John Wesley Conyngham Glasgow, No. 1, September Term, 1911 and find the same to be true and correct thereof so full and complete as the same now remains of record in my office.

[SEAL] In witness whereof I have hereunto set my hand and affixed the seal of said court at Wilmington in said district this fifteenth day of March A. D. nineteen hundred and twelve.

WM. G. MAHAFFY,
Clerk.

51 EXHIBIT N.

In the District Court of the United States
for the Northern District of Georgia

THE UNITED STATES OF AMERICA *vs.* JOHN WESLEY GLASGOW alias JOHN WESLEY CONYNGHAM GLASGOW	No. 1 September Term, 1911 Indictment Violation Act March 4, 1909, C. 321, Sec. 211.

DISTRICT OF DELAWARE, *ss.*

And now, to wit, this sixth day of January A. D. 1912 the District Attorney moves for judgment;

And it appearing to the court that the jury has found the said John Wesley Glasgow, alias John Wesley Conyngham Glasgow guilty in manner and form as he stands indicted in the indictment returned against him in the above entitled cause on the sixteenth day of October, A. D. 1911, it is considered and adjudged by the court now here that you, John Wesley Glasgow alias John Wesley Conyngham Glasgow, do forfeit and pay to the United States a fine of five hundred dollars and the costs of this prosecution; and further, that you, John Wesley Glasgow alias John Wesley Conyngham Glasgow be imprisoned in the United States Penitentiary at Atlanta, Georgia, for the term of fifteen months beginning on this sixth day of January, A. D. 1912, and ending on the fifth day of April, A. D. 1913.

And it is further considered, adjudged and ordered by the court now here that you, John Wesley Glasgow, alias John Wesley Conyngham Glasgow, be now committed to the custody of the United States Marshall for the district of Delaware in order that the foregoing sentence may be carried into execution.

52 WITNESS the Honorable Edward G. Bradford, Judge of said Court, and the seal thereof, at Wilmington, in said district, this sixth day of January, A. D. nineteen hundred and twelve.

(Sgd) WM. G. MAHAFFY,
Clerk U. S. District Court,
District of Delaware.

[SEAL]

Marshal's Return.

DISTRICT OF DELAWARE, *ss.*

I hereby certify and return that, on the eighth day of January, A. D. 1912, at the City of Atlanta, in the State of Georgia, I personally served the within writ by delivering the body of the within named John Wesley Glasgow alias John Wesley Conyngham Glasgow into the custody of William H. Moyer, the Warden of the within named United States Penitentiary at Atlanta, Georgia, and at the same time and place I received from said Warden his receipt for the said body of said defendant and then and there delivered to said Warden a certified copy of the within Commitment.

So answers,

(Sgd) RALPH I. FLINN,
United States Marshal
For District of Delaware

January 10th, 1912.

53 UNITED STATES OF AMERICA } ss.
DISTRICT OF DELAWARE }

I, William G. Mahaffy, Clerk of the District Court of the United States for the District of Delaware, do hereby certify that I have carefully compared the foregoing two typewritten pages with the original committment in the case of the United States of America vs. John Wesley Glasgow alias John Wesley Conyngham Glasgow, No. 1 September Term, 1911, and the Marshal's return on said commitment, and find the same to be a true and correct copy of said committment and marshal's return, so full and complete as the same now remains on file and among the records of said court in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Wilmington, in said district, this fifteenth day of March, A. D. nineteen hundred and twelve.

WM. G. MAHAFFY,
Clerk.

[SEAL]

54 *Waiver of Rules Nisi and Stipulation of Counsel.*

In the District Court of the United States
For the Northern District of Georgia

In re J. WESLEY GLASGOW

Petition for Habeas Corpus.

The petitioner having filed his petition for habeas corpus, accompanied with exhibits, lettered from A to N, inclusive, "J" omitted, as part thereof, and having applied for a rule against W. H. Moyer, Warden of the United States Penitentiary at Atlanta, Georgia, to show cause why the writ should not issue, and now the said W. H. Moyer, Warden as aforesaid, appears in court by his counsel John W. Henley, assistant United States attorney for said district and waives the issuing of said rule nisi, and objects to the issuance and allowance of the writ of habeas corpus prayed, and for cause of objection says that said petition on the face thereof shows that the petitioner is not entitled in law to be discharged on the facts as alleged in said petition.

JOHN W. HENLEY,
Assistant U. S. Attorney.
Counsel for W. H. Moyer, Warden.

And said matter is now submitted to the court.

JOHN C. FAY,
Attorney for Petitioner.

JOHN W. HENLEY,
Asst. U. S. Atty.
Counsel for W. H. Moyer, Warden.

U. S. District Court
Filed in Clerk's Office Mar. 22, 1912.
O. C. FULLER, *Clerk.*
by J. D. STEWARD, *Dep.*

55 In the District Court of the United States
For the Northern District of Georgia.

In re J. WESLEY GLASGOW,

Petition for Habeas Corpus.

Opinion.

This is a petition for a writ of habeas corpus by the above named petitioner, to be directed to William H. Moyer, Warden of the United States Penitentiary at Atlanta, Georgia.

It appears from the application that the petitioner was indicted in the District Court of the United States for the District of Delaware on the 16th day of October, 1911, charged with depositing an obscene book in the United States mail. In December, 1911, the trial took place and the defendant was found guilty. A motion was made in arrest of judgment and for a new trial on December 21st, 1911, and on December 23d, 1911, the same was set for hearing on January 6th, 1912.

When the motion in arrest of judgment and the motion for a new trial came on to be heard the new Judicial Code, approved March 3d, 1911, had gone into effect, that is on January 1st, 1912, and the petitioner here had filed an affidavit under Section 21 of the new Judicial Code, setting up the disqualification of the Judge of the District Court for the District of Delaware, who had tried the case and who was then about to hear the motion in arrest and the motion for a new trial, and same was certified by counsel for petitioner. The Judge held that "in the judgment of the Court, whatever may be the applicability of the section to other cases differently circumstanced, it does not and was not intended by Congress to apply to this case at its present stage, and consequently there was no authority or justification for the filing of such an affidavit as that in question."

The Judge then proceeded to sentence the defendant to be fined
56 $500.00 and to be confined in the United States Penitentiary at Atlanta, Georgia for a term of fifteen months, beginning on the 6th day of January, 1912.

The penalty provided by the statute is a fine of "not more than five thousand dollars or imprisonment not more than five years, or both." The extent of the penalty is therefore clearly within the statute.

The question is first, whether or not the alleged error of the Judge in holding this affidavit ineffectual to stop the case at the stage it had reached, under all the circumstances, could have been taken up for review by the Circuit Court of Appeals, for the Third Circuit. Counsel urge that it could not because, as he states, there was no judge to certify the bill of exceptions or from whose judgment and action the writ of error could have been taken. The position, as I understand it, is that the moment the affidavit was filed the Judge became disqualified absolutely and any act of his thereafter, in the case, would have been void. I am unable to agree with counsel about this. There does not seem to me to be the slightest difficulty where the suggestion is made under this Section of the new Judicial Code, or otherwise, that a Judge is disqualified and he over-rules it and proceeds to try the case or to conclude it if he is engaged in trying it; so far as that action can be taken to the proper

appellate court for review, the Judge who tries the case can certify to what occurred on the trial for the purpose of allowing the same to be so reviewed.

This being true, the action of the Judge was such that it was reviewable, and errors of a judge in the trial of a case will not be considered by another court on habeas corpus.

But the real question in this case is whether or not, under Section 21 of the new Judicial Code, an affidavit such as provided for therein, can be filed after a case has been tried and there is a verdict, and where a motion in arrest and for a new trial has been made, and the attempt
57 by the affidavit is to disqualify the Judge from concluding the case, ruling on these motions and sentencing the defendant if he overruled them.

It will be observed from what has been said as to the dates applicable to this case at its various states, that the case had been tried and a verdict rendered before this new Judicial Code went into effect on January 1st, 1912. Now, can it be conceived that it was the purpose of Congress to apply this act to such a situation? The Section itself provides that such an affidavit shall be filed not less than ten days before the beginning of the term of the court or good cause should be shown for failure to file within that time.

The meaning of this Section is that the affidavit should be filed certainly before the trial of the case commences unless good reason to the contrary is shown. The act evidently contemplates that usually and generally such an affidavit shall be filed not less than ten days before the beginning of the term at which the trial shall take place. It would require some specific language in this act to satisfy me that Congress intended such an affidavit to be filed at the stage which had been reached in this case.

Besides this, as has been stated, all that was done in the case, including the action of the Judge with reference to the affidavit filed under Section 21, was a matter for review by the Circuit Court of Appeals on writ of error, and for the court here to pass upon these questions upon a writ of habeas corpus would clearly be beyond the proper scope and use of that writ.

A great deal is set out in the application with reference to other matters, the improper treatment of petitioner when he was arrested and confined in prison before trial, the route taken by the officers in bringing him to the penitentiary in Atlanta, and other matters not necessary to be referred to here. The right to have this writ issue on the face of it depends entirely, in my opinion, upon whether the affidavit under Section 21 of the new Judicial Code was applicable at this state of the proceedings and whether or not any errors that might have been committed were matters for review by the Circuit Court of Appeals for the Third Circuit. As my opinion is against the contention of counsel for petitioner on these two questions, no case is made in the application for the issuance of the writ. Of course none of us can tell yet exactly how
58 Section 21 of the new Judicial Code will be construed, but I do not see how it can ever be held applicable as presented to the District Court in Delaware in the present matter.

Where an application for a writ of habeas corpus fails to state a case wherein relief could be granted if the writ should issue, it is the duty of

the Court to deny the application. The application for the writ must be denied.

This 29th day of March, 1912.

WM. T. NEWMAN,
U. S. Judge.

U. S. District Court. Filed in Clerk's Office Mch. 30, 1912.
O. C. FULLER, *Clerk,*
by J. D. STEWARD, *Dep.*

59 In the District Court of the United States
For the Northern District of Georgia.

In re J. WESLEY GLASGOW,

Petition for Habeas Corpus.

Order Denying Writ.

This petition for habeas corpus coming on to be heard and having been argued and submitted, upon consideration thereof it is considered, ordered and adjudged by the Court that, the petition for the issuance of the writ showing no legal ground whatever for the discharge of the petitioner if such writ were issued, that the application for the writ of habeas corpus be, and the same is hereby, denied.

This 29th day of March, 1912.

WM. T. NEWMAN,
U. S. Judge.

U. S. District Court. Filed in Clerk's Office Mch. 30, 1912.
O. C. FULLER, *Clerk,*
by J. D. STEWARD, *Dep.*

60 In the District Court of the United States
For the Northern District of Georgia.

In re J. WESLEY GLASGOW,

Petition for Leave to File Appeal in Forma Pauperis.

J. Wesley Glasgow, being duly sworn, says that he is now unlawfully confined in the United States Penitentiary in Atlanta, Ga. and that he is without means to pay the necessary costs and is unable to give security for same for the purpose of an appeal to the United States Supreme Court from Hon. Wm. T. Newman's decision, Judge of the United States District Court for the Northern District of Georgia, refusing to grant a writ of habeas corpus, that all his property personal was seized by the United States upon his arrest and with the exception of his wearing apparel has not been restored to him and that he believes in good faith he is entitled to the redress he seeks by such appeal.

WHEREFORE, he prays the Court to permit him to apply for a writ in Forma Pauperis, as by law provided.

J. WESLEY GLASGOW [L.S.]

Subscribed and sworn to before
me this 6th day of April, 1912.
EDWARD S. CROFT [L.S.]
Notary Public, Fulton County, Georgia. [OFFICIAL SEAL]
Filed in Clerk's Office, April 22, 1912.
O. C. FULLER,
Clerk.

Approved,
WM. T. NEWMAN,
U. S. Judge.

61 In the District Court of the United States
For the Northern District of Georgia.

In re J. WESLEY GLASGOW,

Petitioner.

Notice of Appeal.

Comes now the petitioner in open Court by John C. Fay, his attorney, and gives notice of and takes an appeal from the judgment herein rendered on the 29th day of March, A. D. 1912 to the Supreme Court of the United States, under the provisions of Sec. 238 of the Judicial Code.

JOHN C. FAY,
Attorney for Petitioners.

WILLIAM A. WIMBISH
Of counsel.

Order.

Allowed in forma pauperis in open Court.
April 6th, 1912.

WM. T. NEWMAN,
U. S. Judge.

Service of Copy admitted this day of April, A. D. 1912.
F. C. TATE,
Attorney for Respondent.
Filed in Clerk's Office, April 6, 1912.
O. C. FULLER, *Clerk.*

62 In the District Court of the United States
For the Northern District of Georgia.

In re J. WESLEY GLASGOW.

Appeal.

The above named petitioner conceiving himself aggrieved by the decree made and entered on the 29th day of March, 1912, in the above entitled

cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM A. WIMBISH,
Attorney for Petitioner.

Dated this 22d day of April, A. D. 1912.

Order Allowing Appeal.

The foregoing claim of appeal is allowed.
Dated April 22, 1912.

WM. T. NEWMAN,
U. S. Judge.

U. S. District Court.
Filed in Clerk's Office April 22, 1912.
O. C. FULLER, *Clerk.*

63 In the District Court of the United States
For the Northern District of Georgia.

In re J. WESLEY GLASGOW.

Assignment of Errors.

The Petitioner prays an appeal from the final decree of this Court to the Supreme Court of the United States, and assigns for error:

First. That the Court erred in refusing to grant writ of habeas corpus on the following grounds: (*a*) That petitioner was deprived of his rights under Articles V and VI of the Amendments to the Constitution of the United States. (*b*) That heretofore, on or about the 21st day July, 1912 in the District of Delaware, petitioner was deprived of his personal property without warrant or other lawful process. (*c*) That before conviction or even indictment of the offense charged herein, petitioner was dressed in prison garb, prison rules enforced against him and arraigned in Court in said prison clothes.

(*d*) That the presiding Judge refused to permit a *dedimus potestatum* to issue in order to take the testimony of non-resident witnesses residing more than 100 miles from the place of trial.

64 (*e*) That the presiding Judge refused to allow witnesses residing within 100 miles of the place of trial to be summoned.

Second. That the Court erred in holding that the affidavit of counsel filed under provisions of section 21 of the new Judicial Code was not applicable in this case.

The petitioner prays that the judgment or decree denying writ of habeas corpus may be reversed and set aside and that this Court will order said writ of habeas corpus to be issued.

WILLIAM A. WIMBISH,
Petitioner's Attorney.

U. S. District Court.
Filed in Clerk's Office, April 22, 1912.
O. C. FULLER, *Clerk.*

65 *Citation.*

THE UNITED STATES OF AMERICA, *ss.*

THE PRESIDENT OF THE UNITED STATES,
To WILLIAM H. MOYER,

GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal, duly allowed by the District Court for the Northern District of Georgia, and filed in the Clerk's office of said Court on the 22d day of April, A. D. 1912; in a cause wherein J. Wesley Glasgow, petitioner, is appellant, and you are appellee, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the petitioner in that behalf.

WITNESS, the Honorable Edward D. White, Chief Justice of the United States this 24th day of April, A. D. 1912.

WM. T. NEWMAN,
U. S. Judge.

66 On this 25th day of April in the year of our Lord one thousand nine hundred and twelve, personally appeared Edward S. Croft, the subscriber, and makes oath that he delivered a true copy of the within citation to J. W. Henley, Assistant U. S. District Attorney for the Northern District of Georgia.

EDWARD S. CROFT [L.S.]

Sworn to and subscribed the 25th day of April, A. D. 1912.
O. C. FULLER,
Deputy Clerk.

67 In the District Court of the United States for the Northern Division of the Northern District of Georgia. At Atlanta, Georgia.

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the above and foregoing 66 pages of printing and writing contain a true, full, correct and complete copy of the record, assignment of errors and the proceedings as designated by stipulation of counsel, in the matter of J. Wesley Glasgow, Petition for Writ of Habeas Corpus, as the same remain of record and on file in the clerk's office of the said Court, except that the original citation and return of service thereon is included therein in the stead of a copy.

In testimony whereof I hereunto set my hand and official seal this the 25th day of April, A. D. 1912.

OLIN C. FULLER,
Clerk.

[SEAL]

FILED.
MAY 2 1912
JAMES H. McKENNEY,
CLERK

1 8

IN THE

Supreme Court of the United States

J. WESLEY GLASCOW,
Appellant,
vs.
WM. H. MOYER, ET AL.,
Appellees.
No. 1123

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA DENYING A WRIT OF HABEAS CORPUS.

MOTION TO ADVANCE.

Comes now the appellant in open court and moves the Court to advance the above entitled case upon the docket of said Court and set the same for an early hearing, and assigns as reasons therefor:

FIRST. That the said appellant is now and has been confined in the United States Penitentiary at Atlanta, Ga., unlawfully, since the 8th day of January, 1912, under an illegal sentence, pronounced by the Judge of the United States District Court for the District of Delaware.

SECOND. Unless relieved from said unlawful imprisonment he will be still further confined for the period of fifteen months from the 6th day of January, 1912.

THIRD. That he has already been confined, first during his arrest, before indictment in the State Penitentiary in

Delaware, from the 25th of July, 1911, and has been continuously unlawfully confined since that date.

That the record in this case contains assignments of error in which are involved rights of the appellant under the Fourth, Fifth and Sixth Amendments of the Constitution, and the jurisdiction of the Court which tried him.

FOURTH. The record involves the construction of Sections 220 and 221 of the new judicial code.

FIFTH. That under the new judicial code, appellant contends that the United States District Judge of the District of Delaware is disqualified from signing a writ of error allowing an appeal or signing a Bill of Exceptions by reason of his having been disqualified from proceeding further in said case, and the judgment in that case cannot be reviewed except by this proceeding.

Wherefore, the appellant prays that said motion be granted.

JOHN C. FAY,
CHARLES COLDEN MILLER,
Attorneys for Appellant.

19

FILED.
MAY 13 1912
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 1123

J. WESLEY GLASGOW, Appellant

vs.

WM. H. MOYER, Warden Appellee

BRIEF FOR APPELLANT

JOHN C. FAY
C. C. MILLER
Attorneys for Appellant

COLUMBIAN PRINTING CO., INC., 815 14th ST.

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IN THE

Supreme Court of the United States

J. WESLEY GLASGOW,
Appellant,

vs.

WILLIAM H. MOYER,
Warden, Etc.

No. 1123.

October Term, 1911.

BRIEF FOR THE APPELLANT.

STATEMENT.

This is an appeal from the United States District Court for the Northern District of Georgia denying the writ of habeas corpus applied for by the Appellant and dismissing his petition.

A motion for leave to file a petition for a writ of habeas corpus under the original jurisdiction of this Court was made by Appellant October 23d last averring the unconstitutionality of Section 211 of the Penal Code, under which he had been indicted in the United States District Court for the District of Delaware, the lack of jurisdiction in that Court to try him, and the deprivation by the Judge of the constitutional rights of Appellant, which motion, the special circumstances therein alleged, not being deemed sufficient, was, by the Court, *per*

curiam, citing ex parte Mirzan, 119 U. S., 584; Reggins vs. U. S., 199 U. S., 178, and in re Lincoln, 202 U. S., 178, on October 30th denied, the constitutional and jurisdictional questions not having been passed upon.

The case in Delaware then proceeded, the constitutional and jurisdictional questions having been properly raised in advance of trial, and over-ruled, the trial proceeded, objections being made, and exceptions reserved to adverse rulings, and a verdict of guilty returned by the Jury December 16, 1911; motions in arrest of judgment and for new trial were duly made and by the Court set for hearing on January 6, 1912. (R., p. 20.)

On January 2, 1912, under the provisions of Sections 20 and 21 of the Judicial Code, the Appellant filed his affidavit, certificate of counsel (R., pp. 23-5), with the clerk and paid him his fee, alleging prejudice and bias on the part of the presiding Judge, and requesting its certification as provided in said sections.

On January 6, 1912, the day fixed for the hearing, over the protest of Appellant, Judge Bradford disregarded the affidavit, overruled the motions in arrest of and for new trial sentenced the Appellant to fifteen months in the Atlanta Penitentiary, and a fine of $500 (R., pp. 25-8), and at midnight of that day, by a circuitous route, transported him to the penitentiary, where he is still confined.

To release him from what is contended to be an illegal imprisonment, application for this writ was made to the United States District Court for the Northern District of Georgia, where the Appellant was confined, directed against Colonel Moyer, the Warden of the penitentiary, in whose custody he was. Upon filing the petition the United States District Attorney appeared for the Warden, waived the issuance of a rule *nisi*, and demurred to the pettiion, and the case was thereupon submitted to the Court upon the record, and the demurrer was sustained and petition dismissed, from which order this appeal is prosecuted. (R., pp. 30-33.)

The petition and accompanying exhibits, which are made part of the record, present questions both as to the constitutionality of the statute, the denial to the Appellant of his constitutional rights, the jurisdiction of the trial Court, and the deprivation of the Appellant of any opportunity by bill of exceptions, writ of error or appeal to review not only the errors herein alleged, but of any of the many others that occurred during the trial.

ASSIGNMENT OF ERRORS.

First. The Court erred in refusing to declare Section 211 of the Penal Code, under color of which Appellant was imprisoned, was unconstitutional and void, because,

A The statute is not within the constitutional grant of legislative power to Congress, in that it does not confine its operation to depositing matter in the United States Post Office or other authorized depository for United States mail.

B. The statute does not inform Appellant of the nature of the accusation, nor is an offense described with any certainty.

C. That the statute is an *ex post facto* law.

D. That Appellant was deprived of his liberty and property without due process of law.

Second That Section 211 does create an offense against the United States.

Third. In holding that Sections 20 and 21 of the Judicial Code did not apply to the case at Bar.

Fourth. In holding that Judge Bradford had jurisdiction to impose the imprisonment complained of.

Fifth. In refusing the writ and dismissing the petition.

FIRST.

CONSTITUTIONAL QUESTIONS.

POINT A.

First. The question raised under Point A is that Congress exceeded its constitutional power in not confining the depositing matter in some authorized receptacle of the United States, or for delivery through the United States mail.

The only authority for this kind of legislation, if any exists, is under the grant in Section 8 of Article I, "To establish Post Offices and Post Roads," and whatever is necessarily incident to the exercise of that grant is the measure of their power.

Legislation must be confined to depositing mail matter somewhere within the jurisdiction of the postal system, or the delivery therefrom. This is well illustrated by the limitations set out in Section 215 of the Code, where the language is to "place, or cause to be placed, any letter, etc. * * * **in any post office, or station thereof, or street, or other letter box of the United States, or authorized depository for mail matter to be sent or delivered by the Post Office establishment of the United States,**" etc.

Again, in Section 213, the language is, "shall be deposited in * * * the mails of the United States." This language brings the offense within the power of Congress, but Section 211 contains no such limitation; the language there is, "Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable * * * shall be fined," etc.

Nor does the language of the preceding paragraph aid. All of that paragraph is merely directory to the United States officials; it simply declares what is non-mailable,

and then instructs its officers not to carry it in the mails; it is well within the constitutional grant so far as the physical character of the mails is concerned, but it has nothing at all to do with the citizen, or the penal part of the section.

The offense under Sec. 211 is not restricted to depositing in the United States mail, but depositing non-mailable matter anywhere; it does not even confine it to its deposit for the purpose of being carried in the United States mails, but wheresoever deposited for delivery, not through the mails, but in any way whatever, for any purpose whatever, it makes an offense against the United States.

This statute, by its broad terms, certainly exceeds the powers of Congress to enact, and is therefore unconstitutional and void.

In the case of United States vs. Steffens, 100 U. S., 82 (the trade-mark cases), this Court had this very question before it, and held that act to be void. It was there contended that there was authority for registration of trade-marks under the Commerce clause of the Constitution, but the trade-mark act not being confined to trade-marks used in interstate commerce, the Court declined to introduce into a penal statute words of limitation so as to make it specific when, as expressed, it is general only (p. 99).

Nothing could be broader than the language of Section 211. To bring it within the constitutional grant words of limitation must be imported into the statute, as said by Justice Miller in delivering the opinion, in above case (p. 99), quoting with approval the language of Chief Justice Waite, in U. S. vs. Reese, "To limit this statute in the manner now asked for, would be to make a new law, not to enforce an old one. This is no part of our duty."

In the case of U. S. vs. Reese, U. S. 214, the Court held that a statute enacted under the Fifteenth Amendment to

the Constitution which did not limit the right of negroes to vote upon the grounds set out in that amendment, but which was broad enough to cover discriminations on account of other reasons, was too broad, and for that reason was unconstitutional and void. Chief Justice Waite, in delivering the opinion of the Court, says: "We are, therefore, directly called upon to decide whether a Penal Statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without, as well as within, the constitutional jurisdiction, can be limited by judicial construction, so as to make it operate only on that which Congress may rightly prohibit and punish. For this purpose, we must take the sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not." And, again, the Court says, on page 221, "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large." In the case of the U. S. vs. Harris, the case of the U. S. vs. Reese, *supra*, was quoted with approval, and the Court, failing to find any constitutional authority for the enactment of Sections 5519 in the broad terms of the section, unhesitatingly decided against the constitutionality of the law, so in the case of Baldwin vs. Frank, 120 U. S., is to the same effect; see, also, U. S. vs. Harris, 177 U. S., 305; U. S. vs. Gooding, 12 Wheat, 460; U. S. vs. Sheldon, 2 Wheat, 119, and James vs. Bowman, 190 U. S., 127.

It therefore appears from a consideration of the foregoing cases, and cases cited by the Court therein, that Section 211 exceeds the lawful authority of Congress to enact, and must be held to be unconstitutional and void.

POINT B.

Section 211 is obnoxious to the guarantees contained in the Sixth Amendment of the Constitution, in that it fails by its lack of certainty and the absence of any standard contained in it to inform the accused of the nature and cause of the accusation. So far as the indictment is concerned, it probably is as good as the statute, but it yet leaves out any information by which the character of the offense can be ascertained. So far as the indictment goes we are charged with depositing a "certain obscene, lewd and lascivious book." But by what standard the character of the book or language of the contents are to be determined the statute does not define.

Among the instances where statutes have been held void for uncertainty are:

A statute prohibiting the hauling of more than 2,000 pounds on a narrow-tired wagon or more than 2,500 pounds on a broad-tired wagon, because it fixed no standard for determining what was a broad or a narrow tire. (Cook vs. State, U. Ind. App., 278.)

A statute authorizing the State Board of Health to revoke a physician's certificate for "grossly unprofessional conduct if of a character likely to deceive or defraud the public." (Matthew vs. Murphy, 23 Ky. L. Rep., 750.)

A statute punishing the larceny of a dog as in other cases of larceny, without saying whether it was grand or petit larceny. (Johnston vs. State, 100 Ala., 32.)

A statute that if any officer charged with the collection, receipt, or safe-keeping of public money shall convert to his own use, every such act should be deemed an embezzlement, etc., because it did not specify what must be converted to constitute the crime. (State vs. Taylor, 75 D., 533.)

A statute that "if any railroad corporation shall charge, collect or receive more than a just or reasonable rate of

toll or compensation for the transportation of passengers or freight," it should be deemed guilty of extortion, for lack of prescribing any standard by which to determine what was just and reasonable. (Louis. & N. R. Co. vs. State, 99 Ky., 132; 35 S. W., 129; 59 Am. St. Rep., 457; 33 L. R. A., 209.) In this case the Court said: "That this statute leaves uncertain what shall be deemed "a just and reasonable rate of toll or compensation" cannot be denied, and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier's act, therefore, depends upon the jury's view of the reasonableness of the rate charged; and this latter depends upon many uncertain and complicated elements. * * *

"There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

So, also, in the District of Columbia a statute which uses the word "over-crowding" was bad (——— vs. R.R. Apl., D. C.), and "unprofessional conduct" was likewise held void in ——— vs. Czarra, 25 App., D. C., and cases there cited, and the words "drove or droves of cattle" held inoperative in McConville vs. Jersey City, 39 N. J. L., 38, and in case of U. S. vs. B. & O. S. W. R. R. Co., decided at the present term, the Court says: "If there be no ambiguity the words of the statute are the measure of its meaning; if there be ambiguity the character of the statute determines for a strict or liberal con-

struction. A criminal statute is strictly construed; Courts are not inclined to make 'constructive crimes.'"

The uncertainty of the statute in the use of the word "obscene" cannot be better illustrated than by referring to the variety of meaning that has been attached to it in the various prosecutions had under it in the various District Courts of the United States. Not less than 26 cases* have been before the District Courts of the United States for the definition of the words of this statute, and the various definitions have been almost as numerous as the cases before them. *Tot homines quot sententiae.* Few completely agree, many are in direct and irreconcilable conflict with each other. It has been held that the motive and intent is material, and that it is not material. That the person to whom the book is sent is material, and that it is not material. That medical works can be sent through the mails, and that they cannot be. That if obnoxious to good taste it is obscene, and that "not in good taste" is no criterion. That to be obscene it must appear so the pure, not to the impure, and that this is no test. That comparisons may be made with standard works, and that they cannot be so made. It is not ob-

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U. S. vs. Bennett, Fed. case 14, 571; U. S. vs. Britton, 17 Fed Rep., 733. U. S. vs. Brazeau, 78 Fed. Rep., 465; U. S. vs. Coleman, 131 Fed. Rep., 829; U. S. vs. Commerford, 25 Fed. Rep., 903; U. S. vs. Clark, 37 Fed. Rep., 107; U. S. vs. Cheesman, 19 Fed Rep., 498; U. S. vs. Clarke, 33 Fed. Rep., 402; U. S. vs. Clarke, 38 Fed. Rep., 734; U. S. vs. Davis, 38 Fed. Rep., 327; U. S. vs. Debout, 28 Fed. Rep., 523; U. S. vs. Harman, 45 Fed. Rep., 421; U. S. vs. Lamkin, 73 Fed. Rep., 463; U. S. vs. Moore, 129 Fed Rep., 160; U. S. vs. Martin, 50 Fed. Rep., 921; U. S. vs. Males, 51 Fed. Rep., 42. U. S. vs. Redd, 176 Fed. Rep., 944; U. S. vs. Smith, 45 Fed. Rep., 418; U. S. vs. Smith, 45 Fed. Rep., 477; U. S. vs. Shepherd, 160 Fed. Rep., 584; U. S. vs. Slenker, 32 Fed Rep., 695; U. S. vs. Smith, 11 Fed. Rep., 664; U. S. vs. Timmons, 85 Fed. Rep., 205; U. S. vs. Wroblensky, 118 Fed. Rep., 496; U. S. vs. Williams, 4 Fed. Rep., 485; U. S. vs. Wrightman, 29 Fed. Rep., 636.

scene if free from immoral language, and it is obscene even though couched in chaste words, and many other illustrations might be cited, but the sum and substance of it is that, so vague and uncertain is the language, that it is left to judicial legislation to ascertain what the law is, and at length to the whim of a jury to determine after the act what the law is. This judicial construction has presented a case where for mailing the same book, at three different times, followed by three indictments, under two of them the accused was acquitted because the jury held the book was not obscene, and under the third indictment was convicted, the same book being held by that jury to be obscene. (This case, U. S. vs. Sherman, is reported from stenographic notes in Mr. Anthony Comstock's work, "Morals Not Art or Literature," page 33.)

Under such a statute no one's liberty is safe for a moment, nor is it impossible for the legislature to affix a fixed and definite meaning to the words it employs. The word "indecent" has had its meaning defined by the Act of 27 May, 1908 (35 Stat., 416) in the following language: "Section 3893, Rev. Stat., be amended by adding thereto the following, 'and the term "indecent" within the intendment of this section shall include matter of a character tending to incite arson, murder or assassination,' and there seems to be no good reason why 'obscene' should not be similarly defined."

POINT C.

The uncertainty of the law is as obnoxious to "due process of law" as it is to the requirement of informing the accused of the nature of the accusation against him.

Until the legislature has defined a crime in definite words it has not made a valid law; there can be no due process of law to enforce it.

The deprivation of Appellant of the rights vouched safe to him in the Fifth Amendment to the Constitution,

and set out in the petition and admitted by the demurrer, accomplished his imprisonment without due process of law. Where the indictment was not by the grand jury, but was amended by the District Attorney, his property seized without warrant, correspondence with counsel censored and denied, evidence not allowed to be presented, challenges refused, and jury drawn by interested persons, certainly deprives the proceedings of every element of due process. If an act of Congress authorizing the Court to require the defendant to produce papers is void, as in violation of the Fourth and Fifth Amendments to the Constitution, as held in Boyd vs. U. S., in 116 U. S., 616, can it be said that the seizure *vi-et-ar-mis* by the District Attorney without warrant and suppressing them with the knowledge of the Court, does not so far invalidate the proceeding as to them **undue**, rather than "due process of law."

POINT D.

That such uncertainty in a statute creating a punishment for an act which is *malum prohibitum* only, which in its practical operation and enforcement unavoidably involves judicial legislation in defining the crime after the commission of the act, whether left to the Court or to a Jury, is an *ex post facto* law, and carries with it all the evils that the framers of the Constitution sought to avoid by forbidding such enactment.

The criterion of guilt must be fixed in advance of the act, and not left to the whim of a Court or Jury to fix after its commission.

If one is never to be able to ascertain until after a verdict of guilty has been pronounced against him whether he has committed a violation of law, and the law which he is supposed to have violated is to be evolved out of the inner consciousness of a dozen men chosen by lot long after the event, then all the tyranny and injustice

that Amendment Six forbid to Congress itself can be restored by an irresponsible jury.

In this case Appellant contends that the indictment not being by the Grand Jury in all its parts, as required by Amendment Five, it is not only in violation of that article, but also void as not constituting due process of law.

The case of Rosen vs. U. S., 161 U. S., 29, involved an indictment for mailing an obscene paper, under Section 3883, R. S.

The paper in question contained twelve pages, and it was claimed that the indictment was fatally defective because it did not set out with reasonable particularity the parts of the paper relied on to support the charge in the indictment, that it was in violation of the Sixth Amendment of the Constitution, and did not inform the defendant of the nature and cause of the offense charged. In this case no objection was made before trial to the sufficiency of the indictment, no objection made to the introduction of the paper at trial on the ground that was not sufficiently described in the indictment, and defendant offered a copy in evidence in his own behalf, no motion for bill of particulars being made. In these circumstances, a majority of the Court, in an opinion by Justice Harlan, held that the judgment should not be set aside, and that was all that can be considered as authority in that case.

SUFFICIENCY OF INDICTMENT.

The opinion of the Court, however, is expressly put upon the ground that no objection was made by the defendant before the verdict, which might be said to amount to a waiver of his constitutional right in that regard, and that he made his defense upon the broad ground only that the paper in question was not obscene. In the case at Bar the objection was promptly made,

before the trial, and while the District Attorney furnished a bill of particulars, the matters presented to the jury were entirely dependent upon his personal opinion and not that of the Grand Jury which made the indictment. In the Rosen case the paper contained 12 pages, in this 114. And the alleged obscene parts presented to the jury, and upon which the defendant was tried, which were prepared and designated by the United States Attorney, may have contained much more matter than was found objectionable by the Grand Jury, or matter **entirely different** from that which the Grand Jury found, or which they found not to be obscene at all. In effect, the defendant was tried upon an indictment found by the United States Attorney, whereas the Fifth Amendment to the Constitution requires that the indictment shall be rendered by a Grand Jury.

The facts and record in this case make it distinguishable from the Rosen case; the attention of the Court is earnestly invited to the dissenting opinion of the present Chief Justice and Mr. Justice Shiras in the Rosen case, where it is said, in part: p. 47

"Indeed, the correctness of the ruling in Com. vs. McCance, we think, results from the very nature of things. It being unquestionable that a Grand Jury must find an indictment in order that the prosecution be valid, how can it be said that there has been such a presentment when on the very face of the record it is absolutely impossible to determine what matter the Grand Jury charged to be obscene? To say that it can be applied by a bill of particulars or otherwise is a misconception, for it becomes impossible to supply that which does not legally exist. The Constitution requiring that the Grand Jury should find the indictment, neither the Court, the prosecuting officer, nor any one else, has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitu-

tional safeguards. The general rule requires an indictment to be specific. Stephens vs. State, Wright (Ohio), 73; Com. vs. Gillespie, 7 Serg. and R., 469; 10 Am. Dec., 475; Com. vs. Stow, 1 Mass., 54; Com. vs. Bailey, 1 Mass., 62; 2 Am. Dec., 3; Com. vs. Sweney, 10 Serg. and R. 173; Com. vs. Wright, 1 Cush., 46; Com. vs. Tarbox, 1 Cush., 66; Com. vs. Houghton, 8 Mass., 107; King vs. Beere, 12 Mod., 219; State vs. Parker, 1 D. Chip. (Vt.), 298; 11 Am. Dec., 735. See also Com. vs. Stevens, 1 Mass., 203. To this rule there has been evolved an exception. This exception, as we have said, is that where the publication or mailing of obscene matter is charged by a Grand Jury, such matter need not be stated in the indictment, provided in that instrument it be referred to and identified. Under the ruling now announced, it seems to us that the exception is made to destroy the rule, and that an indictment is held to be valid even although it makes no reference whatever to the matter relied on to show guilt. Thus the qualification as to the identifying reference by which alone the exception is justified disappears, and the result logically leads to the recognition of the right of a Grand Jury to present without stating or referring to the facts upon which its presentment is made, and also concedes the power of a prosecuting officer to supply matter in an indictment, and thus made that which is absolutely void a valid instrument." The wisdom of the rule announced in Com. vs. McCance was well illustrated by the indictment presented in that case, as it is by the alleged indictment under consideration here. Will it be said that an indictment which charged that an accused published obscene matter contained in twenty volumes of books called the "Encyclopaedia Britannica or Americana," giving the title page, and followed by the statement that a more minute description would be offensive to morality, would be adequate? And yet what difference exist, except in degree, between such an indictment and the one here held to be valid? Nor is it

logical to say that as an accused has no right to know the secrets of a Grand Jury room, therefore he is not entitled to be informed as to the matter upon which the Grand Jury bases its presentment. The Constitution forbids in a certain class of cases prosecution except by indictment, and, therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is enitled, under the Constitution, to know the secrets of the Grand Jury room.

SECOND.

The Statute Does Not Create an Offense.

There is no valid law of the United States making the mailing of an obscene book a crime, or one which forbids it.

The present law, Section 211, Penal Code, reads as follows:

"Sec. 211. Every obscene, lewd, or lascivious, and every filthy book, pamphlet * * * is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter-carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 3893, R. S.—the old law—**repealed** by Section 341 of the Penal Code, reads as follows:

"Sec. 3893. No obscene, lewd, or lascivious book, pamphlet, * * * shall be carried in the mail; and any person who shall knowingly deposit or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things, * * * **shall be deeemed guilty of a misdemeanor,** and shall, for every offense, be fined not less than Five Thousand Dollars, or imprisoned at hard labor not less than one year nor more than ten years, or both."

Section 341 of Chapter 15 of the Penal Code provides as follows:

"Sec. 341. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed: Sections * * *; Sections Thirty-eight hundred and ninety to Thirty-eight hundred and ninety-four, both inclusive; * * *"

"Sec. 345. This Act shall take effect and be in force on and after the first day of January, nineteen hundred and ten."

Approved March 4, 1909.

Until a lawful act is made by apt and direct words an offense its commission is not subject to either arrest or indictment.

The mere affixing of a fine or an imprisonment to a lawful act does not *ipso facto* convert it into a felony.

There are no common law offenses against the United States.

Section 341 of the Penal Code having expressly repealed in direct language every vestage of law on this subject, a felony, if one now exists, must find its sanction in the language of Section 211.

That section does not create it a misdemeanor as Section 3893 of the R. S. did.

It does not forbid or make unlawful the mailing of an obscene book.

It simply, without declaring it a felony or misdemeanor or other offense, or even forbidding it, simply attaches a punishment to a lawful act.

A crime cannot be created by implication or construction.

U. S. vs. Eaton, 144 U. S., 677.
Blackstone, Vol. 4, Page 15.
U. S. vs. Sudson, 7th Cranch, 32, vs. Reese, 92 U. S., p. 216.
Johnson vs. State, 100 Ala., 32.

The case cited, *supra*, showing the necessity of certainty in a statute, are also applicable to this question.

THIRD, FOURTH AND FIFTH.

These questions go to the jurisdiction of the Court founded upon the applicability of Sections 20 and 21 of the Judicial Code.

The legislation in Section 21 of the Act of March 3, 1911, is a new departure in the Federal Judiciary, it for the first time gives to the prisoner the right to challenge the presiding Judge for prejudice; while jurors have ever

been subject to challenge for cause and without cause, no way had ever been provided by which a biased Judge could be disqualified, and it is to the everlasting credit of our Judiciary that little harm has ever come by such omission.

A Judge conscious of bias would not hesitate to invite another of his brethren to take his place. This act, while new, has no terror to an upright Judge. At the first intimation that a prisoner harbors such a thought a Judge, conscious of his own integrity, would be impelled to shrink from presiding at his trial and would aid in every way to free the pure fountain of justice from such an imputation, no matter from what source it arose. On the other hand, the act is a valuable weapon to defeat an unworthy Judge from making a mockery of the administration of justice, and seek by fawning to unworthy power to advance his personal ambition.

To avert such a calamity it is a powerful weapon in behalf of liberty and justice.

No better illustration could be found than the case at Bar, where the benign provisions of the statute can be invoked to protect the citizen from malice and persecution; and the cogent reasons given for its invocation were conceded by the Judge himself to be such, if true, as to fully justify his disqualification, and surely it was not intended that the Judge himself, the object of the charges, should decide upon their truth.

The act is a remedial one and entitled to liberal construction in the interest of a fair and impartial trial, guaranteed by the Constitution to the humblest citizen, and the fairness and impartiality must abide with the proceedings from their inception through its every stage until its final conclusion.

A Judge who exhibits and betrays his prejudice while the case is being presented before the Jury and by his bias robs the proceedings of every element of impartiality and coerces a verdict of guilty by methods that shock one's

sense of justice, ought not to be permitted to pass upon a motion in arrest of judgment founded upon his own misbehavior or a motion for a new trial grounded on his own errors, but in the interest of a fair and impartial trial he ought to be **lawfully recalled,** not by the infamous doctrine now being preached by demagogues on the hustings, or practiced at Hillsville, but by the calm, judicial method prescribed of this law, it can work no serious harm to an upright Judge. The certificate of counsel bars the way to its improper use in the first instance, and there is no doubt that the reasons assigned by the litigant must be such that the Circuit Judge or the Supreme Court Justice must at least consider sufficient to make a *prima facie* case, nor would it be an unreasonable construction of the act should such Judge or Justice become the tryers of the truth of the challenge; be that, however, as it may, there certainly is no ground for holding that the challenged Judge shall himself pass upon the question of his own eligibility.

A suggestion that the certificate may be made unscrupulous counsel avails naught. In my judgment the reputation of our Judges is not unsafe in the keeping of the Bar, and no such thing as "unscrupulous counsel" ought to exist, and should it unfortunately so happen, the Judges themselves are not blameless for its occurrence; for they are clothed with full power and jurisdiction to strike from its roll of honor any attorney who fails to observe his professional oath, and in such efforts they are uniformly sustained by the full, active co-operation and hearty endorsement of its Bar.

The words of Section 21 are general and sweeping, and contains no proviso or exception in favor of cases pending when the law went into operation. It is a matter of procedure only, hence there could be no implication that it was intended that in the same Court at the same time different methods should be in force. That a person charged with committing an offense on December 31st

should be tried by a prejudiced Judge, while one committing a similar offense the next day should be tried by an impartial one. The very language that directs that the "Judge shall proceed **no farther** therein," "whenever a party to any action or proceeding shall **make** and **file** an affidavit," shows conclusively that it was to be availed of after proceedings had been had. While the section required it to be filed ten days before the beginning of the term, if good reason for failure to do so was shown it could be filed at any time. The act clearly authorizes the filing of the affidavit, but in this case the Judge forbids even its filing. The docket, if truthfully kept, would show an entry of the filing of the affidavit on January 2, 1912 and the receipt by the clerk of his fees for so filing. But in default of a proper record resort had to be had to evidence *aliundi* to establish the filing of the affidavit, etc.

When Section 21 of the Act of March 3, 1911, went into effect on January 1, 1912, there was pending in the United States District Court of Delaware a proceeding, to wit, a motion in arrest of judgment and a motion for a new trial duly filed on the 21st day of December, 1911, and on December 23, 1912, duly set down for hearing, to take place on January 6, 1912, at 11.30 a. m., as appears by the docket entries (R., p. 20), this proceeding was certainly subject to the operation of that section, and clearly came, not only within the letter, but the spirit and intent of the law.

There is no general saving clause in this act bearing any relation to this case. Section 300, which attempts to save a class of prior cases, is foreign to this. The offense with which the petitioner stands charged was under Section 211 of the Act of March 9, 1909, known as the Penal Code, no part of which was embraced in, amended or repealed by the Act of March 3, 1911, nor does Section 299, which refers only to appeals, have any bearing on the question, but even though it had, it being so clearly repugnant to the clear words of Section 21, it

would by universal authority have been void for its repugnance, but this doctrine is not necessary in this case to rely upon.

Among the many cases on statutory construction that treat analagous subjects the cases Taylor vs. U. S., 4 Howard, 197; Yeaton vs. U. S., 5 Cranch, 281; State vs. Norwood, 12 Md., 195; Hersburg vs. People, 6 Colo., 145, and many others, seem to be directly in point. In Brown vs. Maryland, 12 Wheat., 438, Chief Justice Marshall says: "It is the rule to which all assent, that an exception of a particular thing from the general words proves that the accepted thing would have been within the general words had no exception been made; how much clearer is it that when no exception is made the general words cover the entire subject." In the Colorado case it was held "that whenever there is a repeal or change in a criminal statute, unless there is a saving clause, either express or by clear implication, the new statute or modification and the new conditions take effect in pending cases, and every step taken thereafter under the old law will be **utterly void.**"

So far as counsel can ascertain, but one other case has arisen under this act. In the Eastern District of New York, in a Bankruptcy proceeding.

A similar affidavit was filed after innumerable orders had been passed, and it was promptly certified to the Senior Justice of the Circuit, who immediately designated another Judge.

All of which is respectfully submitted.

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Supreme Court, U. S.
FILED.
MAY 20 1912
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 1123

J. WESLEY GLASGOW, Appellant

vs.

WM. H. MOYER, Warden Appellee

REPLY BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

J. WESLEY GLASCOW,
Appellant,
vs.
WM H. MOYER,
Warden, &c.
} No. 1123.

OCTOBER TERM, 1911.

REPLY BRIEF OF APPELLANT.

For reply to the brief of the Honorable Solicitor General, the Appellant contends: That it fails to meet or refute the authorities cited, or the argument advanced in his behalf.

A mere reading of the statute does not show it to be confined within constitutional limitations, any more than the statute covering counterfeiting of trade-marks was confined to trade-marks used in interstate commerce, or the statutes ostensibly passed for the protection of the elective franchise and other rights was within the grant under the Fifteenth Amendment when the language did not limit the operation of the law to the causes assigned in that amendment nor in the income tax case. While part of the law was within the constitutional power of Congress, they were

broader than that power. All of these statutes have been held by this Court to be unconstitutional on this very ground. It is unfortunate that the Solicitor General could find no authority whatever for his contention and of necessity was compelled to let it rest upon naked assertion.

If his contention is well grounded the designation of places where mail matter must be deposited, so carefully described in Section 215 of the same Penal Code in order to bring the offense under the ban of the statute, becomes utterly unnecessary and mere surplusage. Nor is the fact that this section is found under the title "Offenses against the Postal Service," of any avail, especially in view of Section 339, as follows: "Sec. 339. The arrangement and classification of the several sections of this title have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapters under which any particular section is placed."

Under the present construction of this law, the record in this case on appeal could not be transmitted to this Court by mail, and if sent by express the Clerk of this Court would be subject to indictment under Section 245 of the Penal Code for receiving it. The book itself was filed as the Bill of Particulars, and the Appellant is also under indictment for receiving it from the United States Express Company.

The Solicitor General is not happy in his selection of the case of *Rosen* (161 U. S., 29) as an authority in favor of the constitutionality of the statute. That was not the question in that case. The objection there was solely upon the indictment, not whether the statute itself was unconstitutional, and the Court held, and held only, that the defendant, having failed to avail himself of the objections at the proper time before trial, it was too late after verdict to

take advantage of his own neglect, and under Section 1025, Rev. Stat., these defects were cured by the verdict. It is undoubtedly true that many of the provisions of the Constitution are not self-executing, and a defendant by his own act or declaration may waive them. While the Constitution provides for a trial by jury, it is not at all unusual for a prisoner to waive a jury trial and elect to be tried by the Court; so, he has the right to have the assistance of counsel for his defense. Is it possible that if he elects to be tried by the Court, and refuses to permit counsel to be assigned to him, that after conviction he can have all proceedings set aside because he was not tried by a jury? And does not the same condition arise if he fails to avail himself of it by neglect? This, it is submitted, is all that the Rosen case is authority for, the balance of the opinion must be treated as *obiter*, and has only to sustain it the persuasiveness of its own logic and the acknowledged ability of the eminent jurist that penned it. On the other hand, the dissenting opinion challenges its conclusions, and if more forceful or more persuasive and more in accord with the principles and intent of the framers of the Constitution, ought it not, I most respectfully submit, to prevail.

That the word obscene is one of common speech and so, perfectly understood, I deny. I do not seek to open the mails to the circulation of that class of publications that shock decency, but I do hope that this law may be so amended by describing an offense that it will not be a menace, among others, to the publishers of medical works; so that the Young Men's Christian Association may issue tracts that will warn young men of the dangers of illicit love and the frightful penalties of its indulgence which, by methods now in vogue, subject them to prosecution, and also to avoid the dangers pointed out by that distinguished jurist, Edward Livingston, viz: "Use the

general expression of the English law, and a fanatic judge, with a like minded jury, will bring every harmless levity under the lash of the law; sculpture and painting will be banished for their nudities, poetry for the warmth of its descriptions, and music, if it excites any forbidden passion, will hardly escape."—(Hunt's "Life of Edward Livingston." p. 289). The present administration of this law punishes the innocent and lets the guilty escape, as is well illustrated in *U. S.* vs. *Lamkin*, 73 Fed. Rep., 463, and medical societies and purity workers have already felt the injustice of the uncertainty of this statute. (*Medical Record*, Oct. 12, 1907, pp. 599-600.)

There is no necessity to use the indefinite word "obscene." Matter that ought not to be carried in the mail can be described in such definite language that a "wayfaring man, tho' a fool, may read as he runs," something that will not debar ninety per cent of medical works from carriage in the mails, language that can be passed upon on demurrer and not left to the opinion of an Irish policeman, a German justice of the peace, and a prudish district attorney as literary critics. There are words that have a definite meaning, and others that have not. The word *stone* suggested by Mr. Justice Holmes is not obscure, for the article designated as "a stone" can easily be determined by a chemist; it is one of the words that is susceptible of most definite determination; but "obscene" varys with every mind according to its context, to its motive and to the surrounding circumstances. It cannot be said to have acquired any technical meaning. *U. S.* vs. *Harman*, 45 Fed. Rep., 417.

The objection to the affidavit of prejudice is not well taken. The case had not been "tried." No judgment had been entered, the question whether or not the verdict should ever ripen into a conviction was *in fieri*. *It was to be heard*, and after a hearing the judicial discretion of the presiding

judge was to be exercised in determining what punishment should be inflicted. It might have been a fine of one dollar, or a fine of five thousand dollars and imprisonment in the penitentiary for five years. Ought a judge who had permitted a defendant to be brought into his presence in the uniform of a convicted felon, who sustained the District Attorney in seizing, by unlawful means, and retaining defendant's personal property and papers necessary for his defense; who justified the clerk in garbling the proceedings of the trial, and refused to permit the stenographic report taken by the deputy clerk to be produced to correct them; who in most unjudicial and heated language even denounced his attorney as "morally and professionally depraved" for seeking to invoke in his favor his plain rights, be permitted to pass *sentence*, which could not be modified in any appellate tribunal? Should he be allowed to *settle* the bill of exceptions, and by the arbitrary exercise of his power deprive the defendant of an honest review of alleged errors? If this be so, then the plain words of the statute must be disregarded, and unless a defendant knows in advance of the prejudice of the judge, and cannot avail himself of knowledge that only comes to him after trial is begun and is developed during its progress; the provision for filing at any time "on good cause shown" is unavailing, the command that the judge shall proceed "NO FURTHER" be disobeyed and the most important provisions of the statute nullified; nor is the doctrine that a writ of habeas corpus cannot avail where an appeal or writ of error lies without its exceptions, the cases cited, *per curiam*, of *ex-parte Merzan*, 119 U. S., 584; *Reggins* vs. *U. S.*, 199 U. S., 178; *in re Lincoln*, 202 U. S., 178, fully sustain this, and the Appellant confidently maintains that the circumstances shown in this case are more aggravated than those in the cases cited. I would not dare to refer to occurrences that

took place at the trial not in the record, lest they might be thought to be beyond belief. The matters charged to be immaterial simply corroborates the allegations of the petition, and the lashings inflicted by Crawford (that were taking place at the very moment the sentence was being passed), in whose care and custody the defendant was placed, only illustrate the brutality of the man who, with the consent of the judge, was permitted to enforce against the defendant during his trial the prison rules set out on page 11 of the record, Exhibit F.

The other questions in Appellant's brief are equally relied on and insisted upon.

All of which is respectfully submitted.

JOHN C. FAY,

CHAS. COLDEN MILLER,

Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

J. WESLEY GLASGOW, APPELLANT,
v.
WILLIAM H. MOYER, WARDEN OF THE United States Penitentiary at Atlanta, Ga. } No. 1123.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEE.

The appellant, J. Wesley Glasgow, was indicted at the September term of the District Court of the United States for the District of Delaware, for a violation of section 211 of the Penal Code, 35 Stat. 1088, 1129, committed by depositing in the post office at the city of Wilmington, Del., for transmission through the mails to Frank Wolf, 1215 Court Street, Scranton, Pa., an obscene, lewd, lascivious, and indecent book. (R. 14, 15.) He was tried by a jury and found guilty, and then moved for a new trial and in arrest of judgment; all prior to January 1, 1912. The motions were set to be heard on January 6, 1912. (R. 20 to 22.)

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On January 2, 1912, he made an affidavit, which was certified to by counsel as having been made in good faith, charging the judge before whom he had been tried with bias and prejudice against him and in favor of the United States attorney for the District of Delaware. The various rulings of the judge on the trial of the case are assigned as the reasons for the belief of the affiant that the judge was thus prejudiced. The judge none the less proceeded to the determination of the motions, overruled both, and sentenced Glasgow to a fine of $500 and imprisonment in the United States penitentiary at Atlanta, Ga., for a period of 15 months. (R. 21.)

In March, 1912, Glasgow presented a petition for a writ of habeas corpus to W. T. Newman, judge of the United States District Court for the Northern District of Georgia. The judge was of the opinion (R. 31) that the petition failed to state a case and accordingly denied the writ, and from that action an appeal was taken to this court.

In support of the appeal it is contended that the statute upon which the indictment was based is void; that the indictment does not inform the accused of the nature of the charge against him; and that the judge had no right to deal further with the case after the presentation of the affidavit charging prejudice.

The statute

is as follows, viz:

> SEC. 211. Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter, containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be, used or applied for preventing conception or producing abortion, or

> for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

It is said this statute is too broad in its terms and assumes to punish the transmission of obscene publications otherwise than through the mails. A reading of the statute answers this.

It is objected also that the statute is vague and indefinite, because it does not define the words "obscene, lewd, and lascivious." These are not words of art, but of common speech and of plain meaning. They need no statutory definition. The law was upheld against this objection in *Rosen* v. *United States*, 161 U. S. 29.

The further objection is made that the statute does not make the act which is the subject of the indictment a crime, but simply attaches a penalty to it. This is quite sufficient and is true of most of the penal

enactments of the United States. It is not necessary that in each case the act shall in very words be declared unlawful and a misdemeanor or a felony. That it is prohibited and subjected to punishment makes it unlawful and a crime.

The indictment

will be found on pages 14 to 16 of the record. It charges that the defendant deposited a book in the post office at Wilmington, Del., for transmission through the mails to Mr. Frank Wolf at Scranton, Pa. The book is identified by description and by setting out its title page, and it is charged that this book is obscene, lewd, and lascivious, and so bad in this respect that it would be offensive to spread its contents upon the records of the court. It is also charged that the defendant had knowledge, information, and notice of the contents of the book when he mailed it. He was thus well advised of the charge against him.

The affidavit of prejudice

had no place in this case. The statute which it is contended justifies it is section 21 of the Judicial Code, 36 Stat. 1087, 1090, and reads as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the

> suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

This act did not become effective until January 1, 1912. The case had been tried. Only the motion for new trial and that in arrest of judgement remained for disposition. The act was not retrospective, but looked altogether to the future. Its terms could not be complied with in a case already tried as this one had been. The affidavit could not be filed in time.

Beyond this, the act does not contemplate that in any case a litigant may without objection enter upon a trial before a judge, and when that trial has pro-

ceeded to its close, with a result disappointing his hopes and expectations, set at naught all that has been done, by a charge of prejudice against the judge, based, as is the case here, upon the rulings and orders made by the judge in the course of the trial.

In any event, the sentence can not be dealt with as void. The court had jurisdiction of the case. The verdict of guilty was plainly authorized, and if in the subsequent action of the court there was error it can not be reviewed or corrected on a petition for a writ of *habeas corpus*.

There is much irrelevant matter in the record with which it is not necessary to deal.

It is respectfully submitted that the order of the district judge denying the writ was right.

F. W. LEHMANN,
Solicitor General.

MAY, 1912.

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OPINION

GLASGOW *v.* MOYER, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 1123. Argued May 13, 1912.—Decided June 7, 1912.

The writ of *habeas corpus* cannot be made to perform the office of writ of error.

The rule that on *habeas corpus* the court examines only into the power and authority of the court restraining the petitioner to act, and not the correctness of its conclusions, *Metter of Gregory*, 219 U. S. 210, applies where the petitioner attacks as unconstitutional, or as too uncertain, the law which is the foundation of the indictment and trial.

Where the court below has remitted the petitioner to his remedy on writ of error, it would be a contradiction to permit him to prosecute *habeas corpus*.

A defendant in a criminal case cannot reserve defenses which he might make on the trial and use them as a basis for *habeas* proceedings to attack the judgment after trial and verdict of guilty. It would introduce confusion in the administration of justice.

THE facts are stated in the opinion.

Mr. John C. Fay, with whom *Mr. Chas. Colden Miller* was on the brief, for appellant:

Section 211 of the Penal Code is unconstitutional

Congress exceeded its constitutional power in not confining the depositing matter in some authorized receptacle of the United States, or for delivery through the United States mail.

There is no authority for this kind of legislation under the grant in § 8 of Art. I, "to establish Post Offices and Post Roads."

This statute, by its broad terms, certainly exceeds the powers of Congress to enact, and is, therefore, unconstitutional and void. *United States* v. *Steffens*, 100 U. S. 82; *United States* v. *Reese*, 92 U. S. 214; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Gooding*, 12 Wheat. 460; *United States* v. *Sheldon*, 2 Wheat. 119; *James* v. *Bowman*, 190 U. S. 127.

Section 211 is obnoxious to the guarantees contained in the Sixth Amendment to the Constitution, in that it fails by its lack of certainty and the absence of any standard contained in it to inform the accused of the nature and cause of the accusation. *Cook* v. *State*, 26 Ind. App. 278; *Matthew* v. *Murphy*, 23 Ky. L. Rep. 750; *Johnston* v. *State*, 100 Alabama, 32; *Louis. & N. R. Co.* v. *State*, 99 Kentucky, 132; *Czarra* v. *Board of Medical Supervisors*, 25 App. D. C. 443; *McConville* v. *Jersey City*, 39 N. J. L. 38; *United States* v. *Balt. & Ohio S. W. R. R. Co.*, 222 U. S. 8.

The uncertainty of the statute in the use of the word "obscene" cannot be better illustrated than by referring to the variety of meaning that has been attached to it in the various prosecutions had under it in the various District Courts of the United States. Not less than 26

cases [1] have been before the District Courts of the United States for the definition of the words of this statute, and the various definitions have been almost as numerous as the cases before them. *Tot homines quot sententiae.*

The uncertainty of the law is as obnoxious to "due process of law" as it is to the requirement of informing the accused of the nature of the accusation against him. Until the legislature has defined a crime in definite words it has not made a valid law; there can be no due process of law to enforce it.

That such uncertainty in a statute creating a punishment for an act which is *malum prohibitum* only, which in its practical operation and enforcement unavoidably involves judicial legislation in defining the crime after the commission of the act, whether left to the court or to a jury, is an *ex post facto* law, and carries with it all the evils that the framers of the Constitution sought to avoid by forbidding such enactment. See *Rosen* v. *United States*, 161 U. S. 29.

The indictment is insufficient.

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[1] *United States* v. *Bennett*, Fed. Cas. No. 14, 571; *United States* v. *Britton*, 17 Fed. Rep. 733; *United States* v. *Brazeau*, 78 Fed. Rep. 463; *United States* v. *Coleman*, 131 Fed. Rep. 829; *United States* v. *Commerford*, 25 Fed. Rep. 903; *United States* v. *Clark*, 37 Fed. Rep. 107; *United States* v. *Cheesman*, 19 Fed. Rep. 498; *United States* v. *Clarke*, 33 Fed. Rep. 402; *United States* v. *Clarke*, 38 Fed. Rep. 734; *United States* v. *Davis*, 38 Fed. Rep. 327; *United States* v. *Debout*, 28 Fed. Rep. 523; *United States* v. *Harman*, 45 Fed. Rep. 421; *United States* v. *Lamkin*, 73 Fed. Rep. 463; *United States* v. *Moore*, 129 Fed. Rep. 160; *United States* v. *Martin*, 50 Fed. Rep. 921; *United States* v. *Males*, 51 Fed. Rep. 42; *United States* v. *Redd*, 176 Fed. Rep. 944; *United States* v. *Smith*, 45 Fed. Rep. 418; *United States* v. *Smith*, 45 Fed. Rep. 477; *United States* v. *Shepherd*, 160 Fed. Rep. 584; *United States* v. *Slenker*, 32 Fed. Rep. 695; *United States* v. *Smith*, 11 Fed. Rep. 664; *United States* v. *Timmons*, 85 Fed. Rep. 205; *United States* v. *Wroblensky*, 118 Fed. Rep. 496; *United States* v. *Williams*, 4 Fed. Rep. 485; *United States* v. *Wrightman*, 29 Fed. Rep. 636.

The facts and record in this case make it distinguishable from the *Rosen Case*, 161 U. S. 29.

The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor any one else, has power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. The general rule requires an indictment to be specific. *Stephens* v. *State*, Wright (Ohio), 73; *Commonwealth* v. *Gillespie*, 7 Serg. & R. 469; *Commonwealth* v. *Stow*, 1 Massachusetts, 54; *Commonwealth* v. *Bailey*, 1 Massachusetts, 62; *Commonwealth* v. *Sweney*, 10 Serg. & R. 173; *Commonwealth* v. *Wright*, 1 Cush. 46; *Commonwealth* v. *Tarbox*, 1 Cush. 66; *Commonwealth* v. *Houghton*, 8 Massachusetts, 107; *King* v. *Beere*, 12 Mod. 219; *State* v. *Parker*, 11 Am. Dec. 735. See also *Commonwealth* v. *Stevens*, 1 Massachusetts, 203. The Constitution forbids in a certain class of cases prosecution except by indictment; therefore, to the extent that such knowledge is essential to constitute a valid instrument, the accused is entitled, under the Constitution, to know the secrets of the grand jury room.

The Solicitor General for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This appeal is prosecuted to review the order of the District Court denying petition of appellant to be discharged in proceedings for *habeas corpus* from the custody of the Warden of the United States Penitentiary at Atlanta, Georgia.

The petition alleges the following: On the 21st of July, 1911, while appellant was temporarily in Wilmington, Delaware, he was arrested and charged with peddling books without a license and was convicted in the Municipal Court of the city and fined $5.00. The judgment was

almost immediately remitted and he was re-arrested and charged with having deposited in the United States mails a copy of an obscene book, and by one William G. Mahaffy, a United States commissioner, committed to the custody of the warden of the Newcastle County Workhouse to await the action of the grand jury. Under the direction of the United States Attorney his rooms were pillaged and all of his possessions, clothing, books, etc., were carried off and deposited in the United States court house. Before his conviction he was stripped of his clothing, dressed in prison garb, harsh prison rules were enforced against him and he was fed on unwholesome food. He was so confined and treated until a grand jury, selected by the commissioner who had committed him, found an indictment against him charging him with having deposited an obscene book in the United States mails, and, without seeing a copy of the indictment or knowing its contents, he was arraigned in his prison clothes, notwithstanding the indictment charged no offense against the laws of the United States and was couched in vague and uncertain language that did not apprise him of the offense, defects which he brought to the attention of the judge of the District Court, by pleas to the jurisdiction, demurrers and motions to quash, all of which were overruled, and he was placed on trial before a jury selected by the commissioner who had committed him. Although the array was challenged for that cause and the number of peremptory challenges prescribed by law were not allowed him, he was forced to trial, and the jury under instructions from the court was constrained to find a verdict against him, papers material to his defense having been withheld by the United States Attorney, with the acquiescence of the judge, and process for non-resident witnesses having been refused.

Motions in arrest of judgment and for a new trial were filed and the hearing thereof fixed for January 6, 1912, before Edward G. Bradford, District Judge, who, having,

the petition alleged, exhibited during the trial a deep-seated prejudice against appellant and a violent partiality in his rulings for the United States Attorney, appellant in good faith, as in law he was entitled to do, filed an affidavit charging him, the District Judge, with prejudice, and an application to have the same certified to the senior Circuit Judge, then present in the Circuit Court of Appeals for the Third Circuit, together with the certificate of counsel as required by law.

The petition further alleged that by the filing of the same and by operation of the act of March 3, 1911, 36 Stat. 1087, c. 231, which went into operation January 1, 1912, the District Judge became and was disqualified to further proceed in said cause, and any further action taken by him was without jurisdiction and absolutely null and void; further alleged that the judge forbade the clerk to enter of record the affidavit, forbade the clerk to certify the same to the senior Circuit Judge, proceeded to overrule the motions in arrest of judgment and for a new trial, and, against the protest of appellant, sentenced him to confinement in the penitentiary at Atlanta, Georgia, for a term of fifteen months from the sixth of January, 1912, and to pay a fine of $500.

Appellant, the petition alleged, was placed in the hands of the United States Marshal and by him imprisoned by force in his (the Marshal's) office from about 1 P. M., January 6, 1912, without being permitted to return to the court house to get his personal property there, and at midnight was spirited away by a circuitous route to Norfolk, Virginia, where he was imprisoned all night and all of the next day (Sunday). Thence he was taken, manacled, without being supplied with food or being allowed to purchase any, and delivered under the unlawful order of the District Court to the custody of the appellee, by whom he has ever since been confined in the penitentiary at Atlanta, Georgia.

Appellant, the petition alleged, is by the action recited not only unlawfully imprisoned, but, by the refusal to certify his application, affidavit and certificate of counsel to the senior Circuit Judge, "there is now no judge of the United States District Court of Delaware, and no one there authorized to pass upon his motions in arrest of judgment or motion for a new trial, or competent to sit and certify to the exceptions reserved by him to the many errors committed by said Judge Bradford during his trial, or to permit him to have the same reviewed and set aside by an appellate tribunal."

The allegations of the petition were denied by the District Judge. A writ of *habeas corpus* was prayed, to the end that appellant be discharged or cause to the contrary be shown.

The writ was issued, but upon its return and hearing appellant was remanded to custody.

The court, as grounds for its decision, said: "The real question in this case is whether or not under § 21 of the new Judicial Code, an affidavit such as provided for therein, can be filed after a case has been tried" and verdict rendered, and where the attempt is to disqualify a judge from pronouncing sentence. The court pointed out that in the case at bar there was also the circumstance that the case had been tried and the verdict rendered before the Code went into effect, and the court thought that it could not be conceived that it was the purpose of Congress to apply the act to such a situation, the section itself providing that the affidavit should be filed not less than ten days before the beginning of the term of the court or good cause shown for failure to file within that time. The court said further: "It would require some specific language in this act to satisfy me that Congress intended such an affidavit to be filed at the stage which had been reached in this case."

The court, however, finally concluded that the action of the District Court of Delaware "was a matter for review by the Circuit Court of Appeals on writ for error" and was "clearly beyond the proper scope and use of the" writ of *habeas corpus*.

The assignments of error attack the action of the District Court for error (1) in holding that §§ 20 and 21 of the Judicial Code did not apply to the case at bar; (2) in holding that Judge Bradford had jurisdiction to impose the imprisonment complained of; and (3) in refusing the writ and dismissing the petition. But questions are raised here which were not presented in the petition in the court below or passed on by that court. Section 211 of the Criminal Code act of March 4, 1909, 35 Stat. 1088 (which makes it a crime to deposit obscene books in the mails),[1] under which appellant was indicted, is attacked as unconstitutional because (a) it is not within

[1] "SEC. 211. Every obscene, lewd, or lascivious, and every filthy, book, pamphlet, . . . is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post-office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non-mailable, . . . shall be fined not more than five thousand dollars or imprisoned not more than five years, or both."

"SEC. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. . . ."

the constitutional grant of legislative power to Congress, in that it does not confine its operation to depositing matter in the United States post-office or other authorized depositary for United States mail; (b) it does not inform appellant of the nature of the accusation against him nor describe an offense with certainty; (c) it is an *ex post facto* law; (d) appellant was deprived of his liberty and property without due process of law. It is also asserted that § 211 does not create an offense against the United States.

Appellant, however, even if, in the absence of all proof of their truth, the recitals of the petition which we have previously stated be accepted for the purpose of this proceeding only as true, encounters an obstacle to a consideration of his contentions in the limitation upon the scope of a writ of *habeas corpus,* and this limitation was the ultimate ground of the decision of the District Court.

The writ of *habeas corpus* cannot be made to perform the office of a writ of error. This has been decided many times, and, indeed, was the ground upon which a petition of appellant for *habeas corpus* to this court, before his trial, was decided. It is true, as we have said, that the case had not then been tried, but the principle is as applicable and determinative after trial as before trial. This was decided in one of the cases cited.—*In re Lincoln,* 202 U. S. 178, which cited other cases to the same effect. Subsequent cases have made the principle especially pertinent to the case at bar. *Harlan* v. *McGourin,* (218 U. S. 442) was an appeal from a judgment discharging a writ of *habeas corpus* petitioned for after conviction, and it was held that the writ could not be used for the purpose of proceedings in error but was confined to a determination whether the restraint of liberty was without authority of law. In other words, as it was said, "Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions."

Matter of Gregory, 219 U. S. 210, was a writ of *habeas corpus* brought after conviction, and we said that we were not concerned with the question whether the information upon which the petitioner was prosecuted and convicted was sufficient or whether the case set forth in an agreed statement of facts constituted a crime—that is to say, whether the court properly applied the law—if it be found that the court had jurisdiction to try the issues and to render judgment. And for this many cases were cited.

The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

We have already pointed out that appellant before his trial petitioned this court in *habeas corpus*, and that his petition was denied on the ground that his proper remedy was by writ of error after trial. In his petition he charged mistreatment by the prison authorities, the taking of his papers and property from his room and from the express office, and, that although he informed the United States Attorney, no permission was granted him to examine his papers for his defense. He also in the petition attacked the indictment against him on the ground that it described no offense against the laws of the United States nor an offense "against any valid law of the United States and afforded no justification for his imprisonment." The petition was accompanied by a brief which presented the same contentions as those now presented, though less elaborately.

Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus*. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals. It certainly cannot be said that the District Court of Delaware did not have jurisdiction of the case, including those defenses, or that its rulings could not have been reviewed by the Circuit Court of Appeals or by this court by writ of error. It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict.

Order discharging writ affirmed.